ORIGINAL

U.S. DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

212926

DHX, INC.,

Complainant,

v.

STB Docket No. WCC-105

MATSON NAVIGATION COMPANY
And SL SERVICE, INC., f/k/a SEA-
LAND SERVICE, INC., CSX LINES,
LLC, Successor-In-Interest, and now
Known as HORIZON LINES, LLC,

Defendants.

COMPLAINANT'S PETITION FOR RECONSIDERATION OF DISMISSAL OF COUNT III OF THE AMENDED COMPLAINT OR, IN THE ALTERNATIVE, FOR CLARIFICATION OF ORDER

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Dated: 4 January 2005
Due Date: 5 January 2005

INTRODUCTION

COMES NOW, DHX, INC. Complainant herein, by and through its counsel, pursuant to Rules 1115.3(a) and 1115.3(b) and submits this Petition For Reconsideration of the Board's May 9, 2003 Order in which the Board dismissed Count III (Rate Reasonable- - ness claims) of the Amended Complaint. The Amended Complaint was filed with the Board on April 29, 2002. This Petition brings to the attention of the Board a conflict which exists between decisions of the Board and the recent decision and order of the United States District Court for the Central District of California.

The Board, in its May 9, 2003 order in Docket No. WCC-105, relied upon the November 13, 2001 order in STB Docket No. WCC-101. Docket No. WCC-101 remains pending with the Board. The November 13th order in WCC-101 is therefore not a "final" decision. The Board, in WCC-105 Order 12/13/2004, relied on findings in the May 9th order (WCC-105 Order, 5/9/2003) as well as the November 13, 2001 in Docket No. WCC-101. (See, WCC-105, Order 12/13/2004, Slip Op. at pages 4, 6)

The Board held that Section 13701(a) did not encompass a claim of discrimination as an element of the rate reasonableness. (WCC-101, Order 11/13/2001, Slip Op. at page 5). In the instant proceeding, the Board stated that a claim of discrimination is not a proper basis for finding a rate or practice unreasonable. (WCC-105, Order 12/13/2004, Slip Op. at 6).

This petition, as an alternative to reconsideration by the Board, seeks a clarification from the Board that (1) claims of service and price discrimination are not within the jurisdiction of the Board and therefore need not be brought to the Board, and (2) affirmance of the continuing effect of 49 CFR 1312.2(d) (2004).

Summary of Petition

The Board, by Order dated May 9, 2003, served May 14, 2003, granted a motion of defendant SL Service, Inc. The motion sought the dismissal of Count III of an Amended Complaint filed April 29, 2002. The Board's May 9th Order was based upon an earlier joint motion of defendants and subsequent Order of the Board decided November 13, 2001 in STB Docket No. WCC-101, *Government of the Territory of Guam v. Sea-Land Service, et al.*[1] Count III of the Amended Complaint alleged that defendants had violated section 13701(a) of the ICC Termination Act. Complainant in Count III sought to employ the methodology of rate comparisons (involving the rates that the defendants assessed each other, as well as rates the defendants offered to shippers that tendered the same volumes of cargo as DHX) as a means of establishing that defendants' commodity rates were unreasonable. The Board, in its May 9th Order held that (1) Count III was actually a discrimination claim, (2) that such rate comparison methodology was only applicable to the analysis of the reasonableness of motor carrier rates for past shipments of "defunct carriers" (WCC-105, May 9th at page 8), and (3) that the Board was in the process of "developing an appropriate methodology for assessing rate reasonableness in STB Docket No. WCC-101, ..." (WCC-105, May 9th, at page 8, footnote 10).

The District Court, in the court's Order in *DHX, INC. v. CSX LINES, LLC et al.* Case No. CV 02-6740 RJK, filed January 28, 2003, based upon the motion and argument of the defendant CSX Lines, LLC, held: (1) the civil discrimination complaint filed with that court was the same as Count III of the Amended Complaint, (2) the CSX Lines,

[1] Docket No. WCC-101 is hereinafter referred to as "GovGuam". For the convenience of the Board, the Complainant has attached hereto an Index of Attachments which include the documents referenced herein. The November 13, 2001 GovGuam case Order is identified as Attachment Number 1. Complainant will hereinafter refer to the Board decisions and orders issued in Docket NO. WCC-105 as follows: " WCC-105 Order" with reference to decision date and slip opinion page number.

LLC was a defendant in STB Docket WCC-105, (3) that 'discrimination' was an integral part of a claim for unreasonable rates under section 13701(a) of the ICC Termination Act, (4) that the Board had primary jurisdiction over the discrimination complaint, and (5) the civil case was to be dismissed for want of jurisdiction. The civil complaint, the motion of CSX Lines and the court's Order are included at Attachments 4, 5, and 6 to this petition.

The District Court has ruled that Count III stated a claim under section 13701(a) attacking the reasonableness of defendants' rates. The court took the position that discrimination was integral to the analysis of the reasonableness of a carrier's rates. The Board, on the other hand, held that Count III of the Amended Complaint stated a claim for discrimination rather than rate reasonableness.[2] In addition, the Board dismissed Count III on the basis that the Board was developing the appropriate methodology for assessing the rates that DHX was placing in issue in Count III. The Board is NOT developing a methodology for the evaluation of individual commodity rates in STB Docket WCC-101. Accordingly, one of the underlying factual grounds for the Board's May 9th Order is incorrect. This amounts to plain error by the Board. The Board in STB Docket WCC-101 permitted the Government of Guam to challenge defendants' "aggregate rates". The Board in its November 13, 2001 Order in STB Docket WCC-101, stated that the case involved the establishment of "...a reasonable methodology for

[2] There is no question that common carriers are and remain required to afford the public equality of treatment (this simply means that similarly situated customers must be treated alike). This is a basic principle of U.S. law which can be traced to the Bill of Rights and numerous other State and federal statutes. The statutes regulating interstate commerce date to the 1880s and are reflective of Congressional recognition and adopting of judicial and common law precedent in the original Interstate Commerce Act. Compare as example, Interstate Commerce Commission v. Baltimore and Ohio RRd., 145 U.S. 263, 36 L.Ed. 699, 12 S.Ct. 844 (1892), ('Many features of the Interstate Commerce Act are simply declaratory of pre-existing common law'). More recently see, B.J. Alan Co. v. United Parcel Service, Inc., 5 I.C.C.2d 700, 710 (1989) wherein the Commission recognized the "common law duty" of common carriers to carry for all "with substantial impartiality" citing Michigan Public Utilities Commission v. Duke, 266 U.S. 570, 577 (1925).

assessing a rate structure complaint in this trade" (WCC-101 Order, pages 2, 3, and 4, November 13, 2001)[3]. The analysis and determination of the reasonableness of a "rate structure" cannot be used to determine the reasonableness of specific commodity rates on past shipments. The "remedy" for a rate structure analysis is prospective only. What is involved herein is the invocation of an inapplicable procedure as illusory grounds to deny Complainant rate relief in the Hawaii trade.

Defendants Sea-Land Service, Inc. also known as SL Services, Inc., and CSX Lines, LLC, now known as Horizon Lines, LLC are barred from obtaining the benefit of the Board's May 9th Order by reason of the doctrine of collateral estoppel. It is basic administrative law that an agency order is not "final" and may be revisited, revised or withdrawn at any time prior to the issuance of a "final decision". The Board must now consider the Court's interpretation of section 13701(a) and the preclusive effect of the District Court's Order. Accordingly, it is necessary and proper for the Board to immediately reconsider the grounds (both factual and legal) upon which the Board's May 9th Order in WCC-105 was based. The Order of May 9th likewise formed the foundation or and was referenced in the Board's December 13, 2004 decision in this proceeding (WCC-105, Order, 12/13/2004).

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[3] The Board's November 13th Order in Docket WCC-101 references the proceeding before the Federal Maritime Commission in which the Government of Guam was permitted to litigate the overall reasonableness of defendants' rates and profitability. It appears from the complaint filed in Docket No. WCC-101, defendants were exceeding reasonable "compensation" by approximately 20% to 25% in the Guam trade. It must be brought to the attention of the Board that the Presiding Officer in FMC Docket No. 89-26 (cited in the November 13th Order) has rendered a decision denying reparations. His decision was based upon the inability to establish a legal nexus between a finding of unreasonable rates "in general" with proving a particular rate was unreasonable, and by 'how much'. The Board, at page 4, para. 4, of the November 13th Order, appears to recognize this problem but defers addressing this patent defect in a rate reasonableness "reparations" proceeding. The establishment of overall excessive rates involves and invokes ONLY prospective relief. This is similar to a finding of unreasonableness in a class rate which cannot translate into unreasonableness of specific "commodity" rates. Accordingly, the Board's representation that a methodology is being established to determine the reasonableness of "commodity rates" in Board complaint reparations proceedings is not only incorrect but illusory to the public.

STATEMENT OF FACTS

A. The Complaint Case Before the Board.

The original complaint was filed on or about September 30, 1999. The defendants filed for dismissal of the complaint alleging various defects in the complaint. The Board, by order dated December 19, 2001 (WCC-105, Order 12/19/2001) denied the defendants motions to dismiss. The Board, at page 6 of its order, stated:

> "...although DHX has framed its case principally as a rate case, it appears to us that the gravamen of its complaint is that Matson and SL have engaged in unreasonable practices in an effort to put consolidators such as DHX out of business."[4]

The Board by order dated March 27, 2002 (WCC-105, Order 3/27/2002) directed DHX to file an Amended Complaint. The Amended Complaint was submitted on April 29, 2002 and included a specific Count alleging that defendants' commodity rates were

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[4] This basic factual point is restated by the Board in later orders in this Docket. See, WCC-015, Order 3/27/2002, Slip Op. at page 3; and WCC-105, 5/9/2003, Slip Op. at page 2. The language employed by the Board describes a destructive competition claim. DHX prosecuted its case as such. DHX brought to the attention of the Board that once defendants had removed the cargo volume pricing mechanisms from their tariffs, the defendants violated sections 13701(a) and 13702 by (1) lying to DHX about the existence and availability of volume contracts and rates, (2) failed to publish terms and conditions of such volume rate agreements in furtherance of its deceit, (3) engaging in the mislabeling of tariff provisions to mislead DHX regarding the availability of certain rates, (4) mislabeling of their tariffs, and (5) insertion of various restrictions in their commodity rate tariffs which excluded freight forwarders in general from access to rates necessary to compete for full container load freight. These facts were not disputed by defendants. See; Complainant's Abstract of Undisputed and Disputed Material Facts, Volume 3 of 3 of Complainant's Rebuttal Statements. The Abstract contained 916 Fact Points. Defendants disputed a total of 11 facts. Defendants have admitted 99.98% of the factual premise of Complainant's case. Complainant's averments in its Amended Complaint state the same form and type of complaint that was acknowledged in Shippers Committee, OT-5 v. The Ann Arbor Railroad Company, et al., 5 I.C.C.2d. 856, 864 n. 15 (1989) (unreasonable practice to fail to publish rules and practices related to the failure to comply with sections 10761, 10762 and 10702 of the Act); and further stated in Liability For Contaminated Covered Hopper Cars, 10 I.C.C.2d. 154, 168 (1994). DHX not only cited these statutes in its Amended Complaint but also in Complainant's Opening and Rebuttal presentations to the Board. Complainant specifically noted the failure to comply with the statutory requirement that all carriers party to a joint rate tariff be named in the tariff. 49 U.S.C. 13702(b)(2)(A) (..."at a minimum tariffs must identify plainly—(A) the carriers that are parties to it;"). The Sea-Land/SL/CSX tariffs violate this statutory requirement. The Board's contention that tariffs do not need to identify participating carriers (WCC-l05, Order 12/13/2004, Slip Op. at page 6) is not correct. This represents plain error. Matson's tariffs suffer from the same defects. It was noted that defendants admitted the inaccuracy of and incompleteness of various tariff filings but those admissions/facts escaped the Board's analysis of the record in this proceeding. (See; as example, Attachment B to Complainant's Opening Statements, Statement of Facts and Law).

1999 to March 2002, involved a review of defendants' tariffs. The tariffs of Sea-Land Service, Inc. (later known as "SL Service, Inc.") included a new trade name—"CSX Lines, LLC".[6] The subsequent effort to document the trade name disclosed that SL Service was no longer an operating entity and had either sold or transferred its assets to other entities. To turn a phrase—CSX Corporation had "took the money and run".

The civil complaint, the motion to dismiss by CSX Lines, LLC and the court's resultant order are attached hereto and identified as Attachment Nos. 4, 5 and 6. The contents of Attachment Number 5 reflect the type of situation presented when a shipper brings a civil action against a carrier defendant. The scope of the regulatory statutes is very broad. As such, carriers routinely invoke the coverage of the regulatory statutes and the jurisdiction of the Board. That is what occurred in this case.

CSX Lines alleged that a discrimination complaint was within the subject matter jurisdiction of this Board (Attachment No. 4, pg. 2 of Notice of Motion). CSX Lines alleged that CSX Lines was a named defendant in STB Docket WCC-105 (Attachment No. 4, Memorandum at page 1). CSX Lines alleged that the allegations contained in the

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[6] This issue was dealt with at length in Part A to Complainant's Opposition to Defendant's Motions for Official Notice and to Dismiss Two Counts of the Amended Complaint, filed June 12, 2002. The document included as exhibits (nos. 2, 2-A, 3, 4, 5, and 6) which reflected CSX Lines, LLC was not a new name nor trade name for Sea-Land Service, Inc. Instead, CSX Lines, LLC was identified as a separate and distinct legal entity. Under Delaware corporation law, where both Sea-Land Service and CSX Lines were established, CSX Lines had no liability for the torts nor statutory violations of Sea-Land Service for which DHX was prosecuting its complaint before the Board. Further, Sea-Land, in its Answers to the Amended Complaint, denied that CSX Lines, LLC was a successor in interest to Sea-Land (See; Amended Complaint, averments of paragraphs 15-22, 57-60, and Sea-Land/SL Services' Answers filed May 20, 2002.). Sea-Land admits to the divestment of its physical assets, including terminal facilities and other operations. The corporate records of CSX Corporation, which owns both Sea-Land Service and CSX Lines, reflected "SL Service" as a non-operating entity. The 'operating entity' was identified as "CSX Lines, LLC" and it was plainly stated that CSX Lines commenced business in January 2000. In consideration of this situation, DHX concluded that there was no conflict to the commencement of a separate action against a "separate" company that denied being a defendant in the proceeding before the Board. It must also be noted that Sea-Land had argued that the dispute between DHX and Sea-Land was a matter for the "courts". (WCC-105, Order, 5/9/2003 at Slip Op. page 7). The Board's final decision acknowledges the later admission of defendant that Sea-Land's business and operations were transferred to a 'separate' company known as CSX Lines, LLC and that in February 2003, Horizon Lines, LLC became the "successor entity" to CSX Lines. (WCC-105, Order, 12/13/2004, Slip Op. at page 1, footnote 1).

> This claim implicates the jurisdiction of the STB. DHX's pursuit of this claim while simultaneously pursuing recovery at the STB for the same acts intrudes on the STB's authority to handle its docket and raises the possibility of inconsistent dispositions of what is essentially the same claim. The Court should dismiss this case because federal statutory law leaves no room for a 'federal common law' claim that CSX Lines has unlawfully discriminated against DHX in CSX Lines' rates and practices". (Attachment No. 4, Memorandum at page 15).

The District Court, in accepting CSX Lines' contention that an element of discrimination was part of a rate reasonableness claim under section 13701(a) of ICCTA, permitted counsel for CSX Lines to draft the Order granting defendant's motion to dismiss. The Court ruled that the DHX civil discrimination complaint was a matter that "lies within the primary jurisdiction of the federal Surface Transportation Board ("STB"), not this Court". (Attachment No. 6, page 3). The court's Order noted that discriminatory rates are historically closely tied to the reasonableness of the rates. (Attachment No. 6, page 4). The court then stated:

> "The statute administered by the STB indicates that discrimination remains relevant to the agency's decision-making, 49 U.S.C. 13101(a)(1)(D) and 13702(b)(4)(2000) despite elimination of a specific discrimination cause of action previously benefiting freight forwarders. The STB has already held in a pending administrative complaint proceeding filed by DHX, which is based on substantially the same operative facts as DHX complaint here, that the agency will consider DHX's claims that CSX Lines is trying to put DHX out of business through CSX Lines' pricing and other practices. *DHX, Inc. v. Matson Navigation Co., et al.*, STB Docket No. WCC-105, 2001 STB LEXIS 998 (Served Dec. 21, 2001). Therefore, the Court finds that DHX's complaint lies within the STB's primary jurisdiction."
> (Attachment No. 6, page 4)

The Court's language clearly reflects the opinion that a discrimination element can be and is to be "imported into" the rate reasonableness statute—13701(a).

ARGUMENT

I. COMPLAINANT HAS MET THE STANDARD FOR RECONSIDERATION IN THIS PROCEEDING.

Complainant has submitted this petition in accordance with the provisions of Board Rules 1115.3(a) and 1115.3(b). The rule notes that reconsideration is appropriate to address 'material error'. The Interstate Commerce Commission, in *Genesee & Mohawk Railroad Co.—Acquisition And Operations Exemption—Consolidated Rail Corporation,* 10 I.C.C.2d. 824, 826 (1995), noted reopening is appropriate where a petitioner has shown that a decision "MAY contain material error". There is no requirement of proof beyond a reasonable doubt or 'clear error'. The Board's incorrect assessment of the scope of the rate reasonableness inquiry in STB Docket No. WCC-101 however, more that supports a finding of "factual error". In addition, the May 9, 2003 decision of the Board in this proceeding (WCC-105, 5/9/2003) became "final" upon incorporation in and issuance of the final decision of the Board on December 13, 2004. The conflict in the interpretation of section 13701(a) involves either legal error by the Board or by the Court. Reopening and reconsideration to resolve this conflict is necessary.[7]

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[7] A 'sub-issue' within this overall "legal' issue is the scope and effect of the National Transportation Policy. The case before this Board (WCC-105) contained the argument that the Board, in the interpretation of the reasonableness of a carrier's practices, was guided by the directives contained in the NTP. The Board, in its final decision (WCC-105, 12/13/2004, Slip Op. at page 5) held that the NTP does not provide a 'right of action'. DHX did not argue that the NTP provided a cause of action. DHX contended that the Board's analysis of the reasonableness of defendants' practices was to be measured by whether or not these practices were consistent with or contrary to the 'policies' contained in the NTP and legislative history to the ICCTA. DHX pointed out, among other points, that Congress considered tariff watching, with resultant matching prices, to be an unreasonable practice. The definition of a carrier 'practice' is not contained in the ICCTA. The case law reflects that the term applies to those actions that 'impact' the shippers' pocket book. The Board's treatment of the NTP and its' application in docket WCC-105, is not consistent with the Board contemporaneous treatment of the NTP in docket WCC-104. The Board, in docket WCC-104, stated that: "The policies embodied in the NTP, however, serve as guidance to the Board in every action that it takes. Therefore, while we are dismissing Count I, we will consider the allegations in it, and the general directives of the NTP, throughout this proceeding as we evaluate the unreasonable practice claim in Count II." Trailer Bridge, Inc. v. Sea Star Lines, LLC, STB Docket No. WCC-104, Order dated Dec. 7, 1999, Slip Op. at page 3; and on further discussion, WCC-104, Order dated

II. THE BOARD MUST RESOLVE THE LEGAL CONFLICT IN THE INTERPRETATION OF SECTION 13701(a).

The Statement of Facts contained herein sets forth the inconsistency between the interpretation of section 13701(a) in GovGuam (WCC-101), as applied in the final decision in this case (WCC-105) with the interpretation of section 13701(a) by the District Court. The court adopted the argument and proposed order of the defendant CSX Lines. CSX Lines embraced involvement in the proceeding before the Board and admitted to being the successor in interest to SL Service, Inc. f/k/a Sea-Land Service (which is now a 'defunct carrier'—squarely within the Georgia Pacific criteria as articulated by the Board).

Rudimentary understanding of the scope and history of the original Interstate Commerce Act reveals that one of the primary purposes of that Act was to end wide spread rate discrimination. The filed rate doctrine is merely a tool by which such discrimination was to be exposed and curbed. The prohibition against discrimination was reflective of pre-existing common law.[8] Since the Board has had exclusive jurisdiction

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Oct. 214, 2000, Slip Op. at page 1, footnote 1. How can the Board apply the terms of the NTP to an unreasonable practice claim in WCC-104 while declining to make the same analysis in docket WCC-105?

[8] This is little doubt that 'common carriers', by any and all modes, were subjected to the same common law criteria. The Interstate Commerce Act merely codified many of the common law obligations. See; footnote 2 infra. This included the common law prohibition against discrimination of similarly situated shippers. See; Louis Larrison v. Chicago and Grand Truck Railroad Co., 1 I.C.C. 147, 149 (1887) "Most of the provisions of the Interstate Commerce Act but re-enact the common law and supply some new, while saving all the old remedies. For unlawful discriminations and other wrongs done by common carriers now subject to the recent act, the courts, before the act, afforded the only remedy". The U.S. Supreme Court re-affirmed the doctrine of the English "equality clause" in Western Union Telegraph Company v. Call Publishing Company, 181 U.S. 92-104, 45 L.Ed. 765, 769 (1901) citing Texas & Pacific Railway v. Interstate Commerce Commission, 162 U.S. 197, 40 L.Ed. 940 (1895). The savings clause of the IC Act preserved all rights and remedies at common law or by statute and was not intended to nullify other provisions. It preserved all existing rights and remedies not inconsistent with the remedies afforded by the IC Act. Pennsylvania Railroad Co. v. Sonman Shaft Coal Co., 242 U.S. 120, 61 L.Ed. 188, 37 S.Ct. 46 (1916); Hewitt v. New York, N.H. & H.R. Co., 284 N.Y. 117 (1940). The re-emergence of federal common law, based upon the repeal of federal regulatory statutes, will be noted in further detail infra.

over the noncontiguous domestic trades, the trades have evolved in differing directions. The Alaska and Puerto Rico trade have taken on aspects of 'contract trades' pursuant to the authority contained in section 14101(b) of ICCTA. The Hawaii and Guam trades, on the other hand, have taken many of the aspects of non-competitive markets—including price matching, reduction of vessel capacities/service, and exclusion of freight forwarders from the full container load market as a form of "alternative competition". The defendants admitted to refusing forwarders, including DHX, volume pricing. The reasoning was that such volume pricing would result in greater competition and lower rates. The Puerto Rico trade was used as an example by the defendants of what could happen if forwarders were afforded volume pricing. Carrier profits in Puerto Rico are substantially less than carrier profits in the Hawaii trade.

The problem of rate and service discrimination will not simply disappear. The Board, which has substantial power to address the overall market conditions, needs to clearly articulate that instances of rate and service discrimination are not matters within the jurisdiction of the Board and secondly that, aggrieved shippers have the unobstructed alternative of judicial relief and resolution. On the other hand, the Board must reconsider its decision in both STB Docket WCC-101 and WCC-105 regarding rate discrimination as an aspect of the evaluation of a rate reasonableness claim. Defendants such as CSX Lines, LLC should not be permitted to evade both judicial and administrative review of their actions. Such a result would deny shippers the fundamental right of equal protection which forms one of the bases of our American legal structure.

III. DEFENDANT SL SERVICE AND ITS SUCCESSOR CSX LINES, LLC ARE BARRED FROM CONTESTING THAT COUNT III OF THE AMENDED COMPLAINT STATES A CLAIM BEFORE THIS BOARD.

Defendants SL Service, Inc. and now CSX Lines are barred by the doctrine of collateral estoppel from contesting that Count III of the Amended Complaint states a claim under section 13701(a). The representations of CSX Lines were outlined in the Statement of Facts. CSX Lines prevailed in the District Court. The Order of the Court was entered as a final order. CSX Lines not only had a full and fair opportunity to litigate the issue, but prevailed. The parties before the District Court and this Board are the same. Collateral estoppel is now applicable. See, as example, *Ever-Gotesco Resources and Holdings v. Pricemart, Inc.*, 192 F.Supp.2d. 1040, 1045 (US DC S.D. Cal. 2002) and cases cited therein; *State of Montana v. United States*, 440 u.s. 147, 153-156 (1979).; *Allen v. McCurry*, 449 U.S. 90, 94-98 (1980). SL Service filed its motion to dismiss Count III on behalf of itself and on behalf of defendant Matson Navigation Company. The Board must therefore re-open this proceeding, vacate its May 9, 2003 Order and set this proceeding for further hearing and disposition as to BOTH defendants. Matson may not obtain the benefit of SL Service' motion without likewise accepting the results of SL Service/CSX Lines actions.

In addition to the applicability of the doctrine of collateral estoppel to the defendants in this case, the Board is also obligated to accept and abide by the doctrine. The court in *Puerto Rico Maritime Shipping Authority v. Federal Maritime Commission*, 75 F.3d. 63, 66 (1st Cir. 1996) held that the principle of claim preclusion (i.e. collateral estoppel) was not only applicable in administrative proceedings, but that the agency could not refuse to accord full "faith and credit" to the doctrine. *Ibid.* The District Court's judgment, which

was entered almost two years before the final judgment in STB Docket No. WCC-105, must be accorded controlling weight in STB Docket NO. WCC-105. The Board is now bound by the District Court's Order in so far as this case is concerned.

REQUEST FOR CLARIFICATION OF ORDER

This Petition includes the alternative request that the Board clarify its final Order in regard to the question of the forum for rate and service discrimination claims. Secondly, that the Board re-affirm its regulation that the filing of a rate, item or service designation in a tariff does NOT protect, exclude nor in any manner pre-empt any claim by any shipper that such a tariff item, rule or provision may not be the subject of a judicial suit. A review of the arguments in Attachment No. 5 reveals that carriers continue to represent to judicial forums that the filed rate doctrine and the existence of a tariff preclude judicial adjudication of any matter involving a carrier's tariff. [9] The involved regulation simply re-states existing law. See, as example, *Merchants Warehouse Company v. United States,* 283 U.S. 501, 511, 75 L.Ed. 1227, 1237 (1930) (mere fact that discrimination is effected by way of a tariff does not clothe the discrimination with "immunity").

The Order of the Board makes a very ambiguous pronouncement regarding the issue of carrier discrimination. The Board's final order referenced its May 9th order in regard to the Board designated claim of discrimination. The May 9th order, which in turn was premised upon the order in GovGuam simply stated that discrimination failed to state a claim before the Board. The Board needs to make clear that, as noted above,

[9] A pattern now exists in which courts tend to ignore the Board's regulations and pronouncements. This includes the 'effect' of a tariff filing under 49 CFR 1312.2(d). As example, the District Court ignored the Board's statement of election of forum and concurrent jurisdiction that is contained in National Association of Freight Transportation Consultants—Petition For Declaratory Order, STB Docket No. 41826, 61 Fed. Reg. 60140 (Nov. 26, 1996) Slip Op. at page 6, footnote 3, wherein the Board noted the technical error contained in sections 14704. The Board noted that shippers had the right to make an 'election' of forums for their claims. The courts have simply ignored the Board's interpretation on this matter.

discrimination claims are not subject to the Board's jurisdiction under ICCTA and need not be brought before the Board as is commonly asserted by carriers.[10] The Board should take SL Service up on its argument that shippers would believe that they have claims against carriers may "take their claims to court".

The issue of rate discrimination has only increased since the date of the initiation of this proceeding. The Board's position of the forum in which discrimination claims may be brought would be beneficial to the public. It has been six years since the dates of the actions of carriers which precipitated the complaint in STB Docket WCC-105. A clear articulation of the law in regard to agency versus court jurisdiction over discrimination claims would avoid a repeat of this type of litigation.

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[10] There is no question that common law discrimination exists as a pre-ICC claim. The repeal of regulatory statutes has resulted in the resurrection of pre-existing and previously pre-empted common law. See, as example, First Pennsylvania Bank v. Eastern Airlines, Inc. 731 F.2d. 1113, 117, 1119-1120 (3rd Cir. 1984) (after deregulation, courts were "left free to proceed without circuit to apply familiar federal common law rules"). This also involved a "uniform rule of federal common law". Ivy Broadcasting Company v. American Telephone & Telegraph Company, et al., 391 F.2d. 486, 490-491 (2nd Cir. 1968). Federal common law is now routinely recognized and adopted in the absence of federal regulatory statutes. See, as recent examples, Deiro v. American Airlines, 816 F.2d. 1360 (9th Cir. 1987); Read Rite Corporation v. Burlington Air Express, 186 F.3d. 1190 (9th Cir. 1999); Insurance Co. of North America v. Federal Express Corp., 189 F.3d. 914 (9th Cir. 1999); Seagate Technology v. Dalian China Express, 169 F.Supp.2d. 1137 (ND Cal. 2001); King Jewelry v. Federal Express Corp. 166 F.Supp.2d. 1280 (CD Cal. 2001); Nippon Fire & Marine v. Skyway Freight Systems, 235 F.3d. 53 (2nd Cir. 2000); Fireman's Fund Insurance v. Panalpina, 153 F.Supp.2d. 1339 (SD Fla. 2001); Strategic Assets v. Federal Express Corp., 190 F.Supp.2d. 1065 (MD Tenn. 2001); Rogers v. American Airlines, 192 F.Supp.2d. 661 (ND Tex. 2001). The withdrawal of the statutory anti-discrimination provisions under ICCTA merely permitted the carriers to enter into contracts within the scope and requirements of section 14101(b) but then also made these carriers subject to pre-existing prohibitions against unjust discrimination.

CONCLUSION

Wherefore, in consideration of the above and foregoing, it is hereby respectfully requested that the Board reconsider and reopen its decision in Docket No. WCC-105 to the extent set forth in this Petition. In the alternative, it is hereby respectfully requested that the Board clearly articulate that rate and service discrimination claims are not required to be presented to the Surface Transportation Board prior to the initiation of appropriate civil actions.

Dated: 4 January 2005

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INDEX OF ATTACHMENTS

ATTACHMENT NUMBER 1

30218
EB

SERVICE DATE - NOVEMBER 15, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. WCC-101

GOVERNMENT OF THE TERRITORY OF GUAM
v.
SEA-LAND SERVICE, INC.,
AMERICAN PRESIDENT LINES, LTD.,
AND MATSON NAVIGATION COMPANY, INC.

Decided: November 13, 2001

The Government of the Territory of Guam (GovGuam) has filed a complaint challenging the reasonableness of the rates, rules, classifications, and practices for all transportation by water (including the water portion of intermodal transportation) provided by defendants — Sea-Land Service, Inc. (Sea-Land), American President Lines, Ltd. (APL), and Matson Navigation Company, Inc. (Matson) — in the noncontiguous domestic trade[1] to and from Guam. GovGuam also seeks reparations and damages. Defendants have answered the complaint and have filed a joint motion to dismiss.[2]

BACKGROUND

Historically, jurisdiction over rates in the domestic offshore trade was bifurcated. The Federal Maritime Commission (FMC) had jurisdiction over complaints challenging the reasonableness of so-called "port-to-port" rates (rates that do not involve the services of an inland U.S. railroad or motor carrier). The Interstate Commerce Commission (ICC) had jurisdiction — which it was never called upon to exercise — over complaints challenging the reasonableness of joint rates in the domestic offshore trade (rates held out jointly by water carriers and inland rail or motor carriers).[3]

Effective January 1, 1996, Congress, in the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), abolished the ICC and transferred certain ICC functions to the Surface Transportation Board (Board). The ICC functions transferred to the Board included the responsibility to handle complaints challenging joint rates in the noncontiguous domestic trade.

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[1] The noncontiguous domestic trade involves domestic water transportation (that is, transportation between states, United States territories, or U.S. possessions) that originates or terminates in Alaska, Hawaii, or a U.S. territory or possession. See 49 U.S.C. 13102(15). It is sometimes referred to as the "domestic offshore" trade.

[2] The parties proposed a procedural schedule, which we adopted, providing for a three-step process for resolving this matter. In Phase I (this decision), we address defendants' joint motion to dismiss the complaint, as well as a petition to intervene. In Phase II, we will address an appropriate methodology for assessing rate reasonableness. In Phase III, we will consider the merits of the complaint.

[3] See Joint ICC/FMC Policy Statement, 8 I.C.C.2d 243 (1991).

Congress also transferred to the Board the FMC's jurisdiction over complaints challenging the reasonableness of port-to-port rates in the noncontiguous domestic trade.

This complaint, involving a challenge to the overall level of all of defendants' domestic water rates to or from Guam, is quite similar to a pre-ICCTA complaint that was recently resolved, in part, by the FMC. In Government of the Territory of Guam, et al. v. Sea-Land Service, Inc., et al., 28 S.R.R. 252 (FMC 1998) ("FMC Decision"), the FMC permitted GovGuam to challenge defendants' overall rate structure for their Guam services, notwithstanding defendants' argument that the statute that governed at the time permitted only challenges to specific rates. In its decision, the FMC found that defendants' overall revenues were unreasonable, based on a rate-of-return analysis.

One of the issues in the case filed here is whether Congress, when it transferred to the Board regulatory authority over joint rates (from the ICC) and over port-to-port rates (from the FMC), intended to permit broad "rate structure" challenges such as the case that GovGuam had brought before the FMC. Another issue is whether, in a noncontiguous domestic trade rate case, we should apply the regulatory standards and approach previously applied by the ICC, those applied by the FMC, or "none of the above."

On those issues (and on others that have been raised), each side argues that the Congressional intent is plain and inescapable.[4] However, as to most of the issues raised, the Congressional intent is neither plain nor inescapable. We know, for example, that when it transferred jurisdiction to us in 1996, Congress intended for such cases to be handled under the then-"current basic rate reasonableness requirements."[5] But there is no indication whether that meant that "Congress clearly intended" that the Board apply "the consistent approach of the ICC to [railroad and motor carrier rate cases that had been brought before it],"[6] or whether "Congress [was] explicitly [referring to] the then 'current' FMC regulatory approach."[7] Therefore, as to this and the other issues that have been raised, absent clear guidance from Congress, we must ultimately interpret the statute in a way that makes the most sense to us.

MOTION TO DISMISS

Under 49 U.S.C. 13701(a), rates for transportation "by or with a water carrier in noncontiguous domestic trade . . . must be reasonable." The Board may begin an investigation on its own initiative or on complaint. 49 U.S.C. 14701(a). A governmental authority such as GovGuam can file a complaint about alleged carrier violations, 49 U.S.C. 14701(b), and a

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[4] See, e.g., Complainants' Motion to Dismiss, at 26 ("To grant relief on the basis of GovGuam's complaint would frustrate Congress' clear intent in the ICCTA."); GovGuam's Opposition to Complainants' Motion to Dismiss, at 2 ("The statute itself, as well as a wealth of precedent, is dispositive. . . .").

[5] H.R. Rep. No. 311, 104th Cong., 1st Sess. 113 (1995) (House Report).

[6] Defendants' Motion to Dismiss, at 21.

[7] GovGuam's Opposition to Defendants' Motion to Dismiss, at 26.

governmental authority is explicitly permitted to pursue a complaint on behalf of shippers affected by rates asserted to have been unreasonable, 49 U.S.C. 13701(d)(4).

We may dismiss a complaint that "does not state reasonable grounds for investigation and action." 49 U.S.C. 14701(b). We may issue a final decision upon the filing of an answer or on a motion to dismiss. 49 CFR 1111.4(a), 1111.5. The ICC, our predecessor agency, exercised its authority to dismiss complaints without holding an evidentiary hearing where the issues involved were essentially legal. See ZoneSkip, Inc. v. UPS, Inc. and UPS of America, Inc., 8 I.C.C.2d 645 (1992), aff'd mem. ZoneSkip, Inc. v. United States, 998 F.2d 1007 (3d Cir. 1993). Thus, a complaint will be dismissed if there are no material issues of fact to be resolved in the proceeding. See Caribbean Shippers Assoc., Inc. v. NPR, Inc. et al., STB Docket No. WCC-100 (STB served Mar. 25, 1997), aff'd sub nom. Caribbean Shippers Assoc., Inc. v. NPR, Inc., et al., 145 F.3d 1362 (D.C. Cir. 1998).

In considering a motion to dismiss, we must construe factual allegations in the light most favorable to the complainant. See, e.g., Sierra Pacific Power Co. & Idaho Power Co. v. Union Pacific Railroad Co., STB Docket No. 42012 (STB served Jan. 26, 1998); Trailer Bridge, Inc. v. Sea Star Lines, LCC, STB Docket No. WCC-104 (STB served Dec. 10, 1999) (Trailer Bridge). A decision on a motion to dismiss is not an indication of how the case will ultimately be decided on the merits, after all of the evidence is submitted. Rather, it is simply a determination of whether the factual allegations, when considered in the light most favorable to the complainant, would provide a basis for relief. We dismiss complaints only when we find that there is no basis on which we could grant the relief sought. See Grain Land Coop v. Canadian Pacific Limited and Soo Line Railroad Company d/b/a CP Rail System, STB Docket No. 41687 (STB served Dec. 8, 1999).

Here, with the exception of GovGuam's discrimination claim, we cannot say that there is no basis on which we could grant the relief sought. Thus, we will deny the motion to dismiss the complaint.

We turn now to the specific arguments raised by defendants as to why the complaint should or must be dismissed.[8]

Aggregate Rate Challenge. Defendants assert that GovGuam's complaint must be dismissed in its entirety because, according to defendants, section 13701(a) permits only challenges to specific rates. Here, the complaint does not challenge the reasonableness of any individual rate, but instead asserts that all of the defendants' numerous rates are unreasonable because, in the aggregate, they produce excessive revenues.

Section 13701(a) provides that "a rate for a movement by or with a water carrier in noncontiguous domestic trade . . . must be reasonable." While this language expressly provides

[8] Defendants also argue as a general matter that competition in the Guam trade has held rates at reasonable levels. But the Department of Transportation, we note, has concluded, in Competition in the Noncontiguous Domestic Maritime Trades, March 1997, at III-18, that "concentration is high in the Guam trade." Thus, defendants' general assertions about the state of competition in the Guam trade cannot be regarded as establishing facts sufficient to warrant summary dismissal.

for a party to challenge a rate, it does not on its face preclude challenges to a group of rates. Indeed, in the FMC Decision, the FMC considered a complaint challenging rates in the aggregate under a similar statutory provision. This reading of the statute is bolstered by 49 U.S.C. 13701(d)(4), which provides that, when a finding of unreasonableness has been made, "the Board shall award reparations . . . in an amount equal to all sums assessed and collected that exceed the reasonable rate, division, rate structure, or tariff" (emphasis supplied).

In their response to GovGuam's opposition to their motion to dismiss (at 7), defendants argue that the term "rate structure" in section 13701(d)(4) does not signify rates in the aggregate, but instead "most naturally means the method by which rates in a tariff are constructed – for example, by mileage, by weight, by some classification system, or on a carload, multicarload or group basis." But we do not believe that Congress would have provided for reparations for sums that exceed a "reasonable rate structure" if it had simply been referring to such mechanics. Indeed, as the ICC observed in a broad investigation of railroad general rate increases: "Basic to this investigation is the realization that the 'railroad rate structure' embraces a large number of interrelated and individually formulated rates and rate patterns." Investigation of Railroad Freight Rate Structure, 340 I.C.C. 868, 880 (1971). Thus, the language providing that "a rate . . . must be reasonable," and that the Board may award reparations for amounts that exceed "the reasonable rate [or] rate structure," is broad enough to require that complainant at least be offered a chance to present its case.

Defendants argue that acceptance of this complaint would contravene the intent of Congress in the ICCTA when it transferred regulation of port-to-port rates from the FMC to the Board. However, the only clear Congressional intent that we can see was to centralize jurisdiction over the noncontiguous domestic trade in a single agency. The divided regulatory authority was a source of concern to Congress for many years, and Congress considered centralizing regulatory jurisdiction of the trade in the "Domestic Offshore Commerce Regulatory Reform Act of 1986,"[9] and again in the "Intermodal Shipping Act of 1989,"[10] but neither bill was enacted. In the ICCTA, Congress finally centralized review at a single agency — the Surface Transportation Board — with the intent of "consolidating the regulation of these trades in a single panel, [so that] a more consistent and efficient transportation policy can be achieved." House Report at 113. But in transferring sole responsibility to the Board, rather than the FMC, Congress did not clearly articulate a preference for the regulatory approach of the ICC or the FMC. In fact, it is reasonable to infer that Congress knew that a major GovGuam case was pending at the FMC, and that it left it to the Board to decide whether or not to follow whatever approach the FMC might finally adopt.

Defendants argue that permitting challenges to multiple rates would be unworkable, as it would lump together diverse products moving under different conditions, and could require across-the-board rate reductions even for movements subject to highly competitive rates. Defendants' concern about how we might approach any rate reasonableness review is premature under the three-stage approach to which the parties have agreed in this case. But we note that a finding that rates in the aggregate are unreasonable would not necessarily require across-the-board rate reductions as a remedial measure.

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[9] H.R. Rep. No. 4973, 99th Cong., 2d Sess. (1986).

[10] H.R. Rep. No. 2498, 101st Cong., 1st Sess. (1989).

Defendants also argue that a rate-of-return-based methodology is impermissible under our statute and infeasible given the nature of the traffic that they handle. We understand their arguments (as well as GovGuam's argument that a rate-of-return approach is what Congress expected the Board to apply to cases such as this one), and we will determine, in Phase II of the proceeding, whether there is a reasonable methodology for assessing a rate structure complaint in this trade. For purposes of the motion to dismiss, however, arguments about methodological issues are premature and will not be addressed further at this time. The parties will have an opportunity to brief those issues more fully before we issue a Phase II decision.

In short, we will not dismiss this complaint simply because it challenges a group of rates rather than specific rates.

Discrimination. Defendants maintain that GovGuam's complaint must be dismissed to the extent that it alleges that the defendants' rates, rules, and practices are discriminatory. Defendants argue that former section 10741(b), which prohibited unreasonable discrimination by common carriers, was repealed in the ICCTA for all carriers except rail carriers. GovGuam acknowledges this repeal, but argues that the rate reasonableness requirement in section 13701(a) encompasses discrimination, i.e., that a rate, classification, rule or practice can be unreasonable because it is discriminatory.

GovGuam's claim that "reasonableness" embraces a prohibition against discrimination is not tenable, given the fact that the pre-ICCTA provision specifically permitting claims of discrimination was eliminated for water carriers. To import the repealed provision into another section of the statute, as GovGuam would do, would plainly violate the Congressional intent. Thus, GovGuam could not prevail simply by showing that different shippers pay different rates for arguably similar services, and this aspect of its complaint will be dismissed.

Statute of Limitations. GovGuam, which filed its complaint on September 10, 1998, seeks reparations for movements since September 10, 1995. Defendants assert that the 2-year statute of limitations period in section 14705 for claims for damages governs this action, requiring dismissal of the complaint for shipments prior to September 10, 1996. We agree.

The applicable statutes of limitations are set forth at 49 U.S.C. 14705(b) and (c). Section 14705(b) provides that a complaint for overcharges must be filed within 3 years. Section 14705(c) provides that a complaint to recover damages must be filed within 2 years. The term "overcharges" refers to amounts charged by a carrier in excess of the applicable tariff rate,[11]

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[11] The term "overcharges" has a specific meaning in the transportation context. Before 1978, the term was specifically defined, in § 16(3)(g) of the Interstate Commerce Act:

> (g) The term "overcharges" as used in this section shall be deemed to mean charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission.

And the term was defined in nearly identical words at § 308(f)(4), as applicable to domestic water carriers subject to the ICC's jurisdiction under Part III of the Interstate Commerce Act:

(continued...)

whereas the term "damages" refers to amounts recoverable for violations by a carrier other than overcharges.

In this case, GovGuam does not claim that defendants have charged anything other than the rates in the applicable tariffs. Instead, it seeks relief on the ground that defendants' rates, overall, are unreasonably high. Under section 14705(c), and under the laws that applied for many years before passage of the ICCTA,[12] claims for damages are subject to the 2-year statute of limitations period.

GovGuam argues, however, that a 3-year statute of limitations should nevertheless be applied to its complaint. It interprets sections 14705(b) and (c) as creating three statute of limitations periods. Specifically, GovGuam maintains: (1) the first sentence of section 14705(b) provides an 18-month statute of limitations for civil actions for overcharges; (2) the second sentence of section 14705(b) provides a 3-year statute of limitations for all complaints brought before the Board other than overcharges (i.e., damages); and (3) section 14705(c) provides a 2-year statute of limitations for overcharge complaints before the Board.

GovGuam's position is based on what we have concluded is an "apparent technical error in the statute." See National Association of Freight Transportation Consultants, Inc.—Petition for Declaratory Order, No. 41826 (STB served Nov. 26, 1996), at 8 n.3. The 3-year statute of limitations for overcharges in section 14705(b) makes reference to section 14704(c)(1), whereas the 2-year statute of limitations for damages in section 14705(c) makes reference to section 14704(b). But section 14704(b) (to which the 2-year damages limitation refers) describes damages in terms of an overcharge ("amounts charged that exceed the applicable [tariff] rate").

It is obvious that a technical mistake was made in executing amendments to H.R. 2539, which, after reconciliation with S. 1396, became the ICCTA. As reported by their respective committees, both the House and Senate bills placed the overcharges provision in section 14704(b)(1) and the damages provision in subsection (b)(2). In both bills, section 14705(c) accurately referred to damages as described in section 14704(b)(2). See House Report at 62; 141 Cong. Rec. S17573 (daily ed. Nov. 28, 1995) (Senate bill). When certain amendments to the bill

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[11](...continued)

(4) The term "overcharges" as used in this section means charges for transportation services in excess of those applicable thereto under the tariffs lawfully on file with the Commission.

Although the 1978 recodification of the Interstate Commerce Act eliminated these specific definitions, it did not substantively change the law. See Section 3(a) of Pub. L. No. 95-473, Oct. 17, 1978, 92 Stat. 1466 ("Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced.").

[12] Former section 11706(c)(1), for example, provided for a 2-year statute of limitations for damage complaints, while former section 11706(b) provided for a 3-year statute of limitations for overcharge claims.

reported out by the House[13] were executed, however, section 14704(b)(2) (making a carrier or broker liable for damages) was redesignated as section 14704(a)(2), and what had been section 14704(b)(1) (pertaining only to rate overcharges) was designated as section 14704(b), under the new title "LIABILITY AND DAMAGES FOR EXCEEDING TARIFF RATE." This switching of subsection numbers was clearly not intended by the House to change well established limitations periods; indeed, in the House bill reported out, section 14705(c) continued to refer to section 14704(b)(2), a subsection that did not continue to exist under the House bill as inadvertently modified. See 141 Cong. Rec. H12292.

Moreover, it is clear that the House and Senate conferees did not intend to change the statute of limitations for damages. Both the House and the Senate, in describing section 14705 in the bills that each body reported out, stated that the intent was to preserve existing statutes of limitations. See House Report at 121; S. Rep. No. 176, 104th Cong., 1st Sess. 48 (1995). There was no discussion in the House about statutes of limitations, and the Conference Report,[14] at 222, clearly indicates that both the House and Senate bills, which were deemed to be "identical" on this matter, "preserve[] the current statutes of limitations." We do not believe that an unintentional technical error such as the one made here overrides the obvious Congressional intent.

Thus, we conclude that, if the complaint succeeds on the merits, reparations may not be awarded for transportation provided more than 2 years before the complaint was filed, i.e., before September 10, 1996.[15]

American President Lines. Because APL left the trade before the September 10, 1996 limitations date, no shipments handled by APL are subject to this complaint. Therefore, we will dismiss APL as a defendant in this proceeding.[16]

Zone of Reasonableness. Notwithstanding the FMC's finding that Guam rates during the years 1988, 1989, and 1990 were too high, defendants argue that GovGuam is now barred by the statutory "zone of reasonableness" (ZOR) from challenging many of these same rates for post-ICCTA movements. Section 13701(d)(1) states that "a rate or division of a motor carrier for service in noncontiguous domestic trade or water carrier for port-to-port service in that trade is reasonable if the aggregate of increases . . . in any such rate or division is not more than 7.5 percent above . . . the rate or division in effect 1 year before the effective date of the proposed rate or division."[17] Defendants argue that, because most of their rates have not been increased by

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[13] See 141 Cong. Rec. H12262-12265 (daily ed. Nov. 14, 1995).

[14] H.R. Rep. No. 422, 104th Cong., 1st Sess. (1995).

[15] Because we have determined that the 2-year statute of limitations applies, defendants' argument that considering the rates on shipments prior to January 1, 1996, would constitute improper retroactivity is rendered moot.

[16] APL may, if it chooses, continue to participate as an intervenor.

[17] Section 13701(d)(1) also provides a ZOR for rate decreases, which is not relevant here.

more than 7.5 percent in any year, GovGuam is barred by the ZOR from challenging those rates as unreasonable.

We do not agree. Although the language of this provision is not entirely clear — as defendants note, the first part of the cited sentence states that "a rate . . . is reasonable if . . ." — it appears to us to provide a safe harbor for rate increases, not for "base" rates. The rest of the cited sentence indicates that the ZOR applies only to a "proposed rate," i.e., a rate that is to be changed, and that the new rate would be deemed reasonable if the amount by which it increases the prior rate is within the ZOR. Nowhere does the provision say that a party may not challenge a base rate to which the ZOR is applied.[18] Moreover, the legislative history indicates that base rates are not immune from challenge. The House Report, in explaining the meaning of the ZOR, states (at 113):

> [A] carrier may increase or decrease a base rate by not more than 10 percent of the base rate in effect one year before that date and the new rate is considered reasonable. . . . However, this zone of reasonableness of rate increases does not mean that the base rate cannot be challenged as unreasonable.

Defendants argue that the House approach was rejected because the ICCTA adopted the Senate version of the ZOR. But the language of the ZOR was virtually identical in the House and Senate bills, with the exception of size (10 percent in the House Bill, 7.5 percent in the Senate Bill), and there is no indication that Congress intended to upset the House's expectation that base rates would be challengeable.[19]

Defendants further argue (Motion to Dismiss at 84) that the language in the House Report, at most, "can be understood simply to state the obvious proposition that the ZOR works forward but not backward." In other words, they assert (id. at 86), "the ZOR means that a rate on Day 0 is reasonable if it is not 7.5 [percent] higher than the rate [365 days earlier], but it does not mean that the rate [365 days earlier] is reasonable just because it is within 7.5 [percent] of the rate on Day 0." Rather, to determine whether that rate is challengeable, their position is that we

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[18] The ZOR for water carriers appears to have been modeled after the zone of rate freedom (ZORF) adopted for motor carriers in the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 (1980) (MCA). Section 11 of the MCA essentially precluded the ICC from investigating and suspending a proposed rate if the proposal would produce a rate not more than 10 percent above or below a base rate. The statutory language and the legislative history of the MCA (see H.R. Rep. No. 1069, 96th Cong., 2d Sess. 24-25) plainly indicate that the provision applied only to a "proposed rate," and not to a base rate itself, and that in practical terms, it served as a limit on "the Commission's authority to suspend and investigate a proposed rate," id. at 25.

[19] Indeed, the Conference Report states, at 205:

> The Conference adopts the House Provision modified by the Senate language in subsection (d) establishing a "zone of reasonableness" of 7.5 percent . . . above or 10 percent below the rate in effect one year prior to the proposed rate for motor carriers and port-to-port movements by water carriers in the noncontiguous domestic trade.

would again look back and see if it is more than 7.5 percent higher than the rate in effect 365 days earlier; "[a]nd so on, and so on."

We understand that Congress wanted to give water carriers some degree of certainty as to whether rate changes could be challenged. But absent a clear intent — such as that expressed in the 1980 railroad legislation — that then-existing rates would become protected base rates that could not later be challenged,[20] we cannot read a provision protecting "proposed" rates as immunizing existing rates that were found unreasonable when they were challenged before the FMC.

Rate Divisions. The complaint challenges "rates for all transportation by water, including the water portion of all intermodal transportation." Defendants state that the majority of their rates between Guam and the West Coast of the continental United States are joint through rates with participating motor carriers, not port-to-port rates.[21] Defendants assert that GovGuam's complaint must be dismissed to the extent that it challenges only the water portion of such joint intermodal rates, on the ground that a carrier's individual share (division) of a joint water/motor rate may not be separately challenged.

We do not agree. The general rule is that joint rates are unitary rates that must be challenged as a whole.[22] But that is not always the case. See Pennsylvania v. ICC, 561 F.2d at 281 (for international traffic subject to overlapping agency jurisdiction, ICC required tariff filing but "limit[ed] its substantive regulation of the single factor joint land/ocean rate to the [land] portion only."); id. at 292 (in the context of that case, substantive review of a division of a joint rate was "not an attempt to regulate inter-carrier 'divisions' as such," but was simply a

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[20] In section 203 of the Staggers Rail Act of 1980 (Staggers Act), Pub. L. No. 96-448, 94 Stat. 1895, Congress set up a more expansive ZORF for railroad rates. The rail ZORF established a safe harbor for certain base rates, and for inflation-based changes to those base rates. See Western Coal Traffic League v. United States, 677 F.2d 915, 918 (D.C. Cir.), cert. denied, 459 U.S. 1086 (1982). The Staggers Act ZORF, however, applied only to base rates that were found reasonable after complaint, or that were deemed reasonable because they were not challenged within a 180-day window. See section 229 of the Staggers Act, former 49 U.S.C. 10701a note. The specific procedure established in the Staggers Act for immunizing base rates that were not challenged within the time period that Congress provided is in stark contrast to the motor carrier ZORF and the water carrier ZOR.

[21] When carriers hold out joint-rate services, because the carriers are jointly and severally liable for damage to the freight, shippers typically pay a single freight bill, with the payments then divided among the participating carriers. See Pennsylvania v. ICC, 561 F.2d 278, 281-82 (D.C. Cir. 1977), cert. denied, 434 U.S. 1011 (1978).

[22] See Great N. Ry. v. Sullivan, 294 U.S. 458, 463 (1935) (Great Northern); L&N R.R. v. Sloss-Sheffield Steel & Iron, 269 U.S. 217, 234 (1925). But see Central P&L v. Southern Pac. Transp., et al., Nos. 41242, 41295, 41626 (STB served Dec. 31, 1996) and (STB served April 30, 1997), aff'd sub nom. Union Pac. R.R. v. STB, 202 F.3d 337 (D.C. Cir. 2000) (Union Pac.) (shippers may challenge a "bottleneck segment" of a rail joint rate when the non-bottleneck portion of the service was handled under a rail contract not subject to Board regulation).

permissible action "to focus ICC regulation on" a particular portion of the rate). See also Union Pac., supra note 22.

GovGuam argues that in the ICCTA Congress created an exception that would permit water carrier divisions to be challenged separately. But we need not decide here whether, as a general matter, Congress intended that we entertain complaints about divisions of specific joint rates in the noncontiguous domestic trade. This complaint does not challenge any particular joint rates; it is directed at the water carriers' overall rate levels. As we understand it (although the parties have not addressed the point here) joint rates in the noncontiguous domestic trade are often set by simply adding a motor carrier component to the same water carrier component that is used for port-to-port rates. Therefore, while numerous motor carriers may participate in particular joint rates with the water carriers, the motor carrier component does not appear to be a part of the water carriers' rate structures, so that review of the combined motor-water rates would not add anything to a review of the water carriers' overall rate levels. Unless the carriers can demonstrate that the motor carriers are integral components of the water carriers' rate structures, for purposes of this case GovGuam need not join all of the participating motor carriers in this complaint.

PETITION TO INTERVENE

Caribbean Shippers Association, Inc. (CSA) has petitioned to intervene as a party in this proceeding. Though CSA has no interest in the particular rates challenged in this complaint, it is concerned with the potential impact of the outcome of the determination of rate reasonableness standards on future rate proceedings involving other geographic segments of the domestic offshore trades. It asserts that this proceeding may set precedent that will apply to future rate reasonableness cases. CSA states that its intervention would be limited to Phase II of this proceeding. GovGuam and respondents oppose intervention on the ground that CSA's interests, stemming from an entirely different market, would, of necessity, burden the record with matters irrelevant to this complaint.

Because CSA's interests are limited to matters of general regulatory policy, we do not believe its participation in this proceeding will unduly broaden the issues, nor will it disrupt the procedural schedule in any significant manner. Therefore, we will grant CSA's petition to intervene.

PROCEDURAL SCHEDULE

By the terms of the January 6, 1999 decision, service of this decision begins the timetable for Phase II of this proceeding, in which the parties will address the appropriate rate reasonableness methodology to be applied to this case. Unless the parties agree on a different schedule, and submit it to us for approval, simultaneous initial submissions on the rate reasonableness methodology are due 55 days from the service date of this decision. Simultaneous replies are due 110 days after the service date.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. APL is dismissed as a party defendant to the complaint.

2. The motion to dismiss the complaint is granted in part and denied in part as indicated in this decision.

3. Caribbean Shippers Association, Inc., is permitted to intervene as a party in this proceeding.

4. Under the procedural schedule previously established for this proceeding, the parties' submissions on the rate reasonableness standard are due January 9, 2002. Replies are due February 25, 2002.

5. This decision is effective on its service date.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary

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ATTACHMENT NUMBER 2

Before The
SURFACE TRANSPORTATION BOARD

Government of the Territory of Guam Complainant v. Sea-Land Service, Inc. American President Lines, Ltd. Matson Navigation Company, Inc. Defendants	)	Docket No. WCC - 101

MOTION TO DISMISS COMPLAINT
(Volume One of Three)

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February 16, 1999

TABLE OF CONTENTS

Transportation Board, No. 97-1081 (8th Cir. Feb. 10, 1999). In Bottleneck, the STB affirmed the continuing vitality of the L&N/Great Northern principle for traffic moving under a combination of common carriage proportional rates, which the STB continued to view as akin to joint rates properly challengeable only in their entirety. "For such rates," stated the STB, "the shipper's only interest is that the charge shall be reasonable as a whole." Bottleneck, 1996 STB LEXIS 358 at *28 (quoting Great Northern, 294 U.S. at 463 and L&N, 269 U.S. at 233). Accordingly, the STB held that "a shipper's challenge to the reasonableness of a proportional rate covering a bottleneck segment that is combined with a common carriage rate over the non-bottleneck segment must, in our view, address the reasonableness of the entire through rate as a whole." *Id.* at *29-30. See also Western Resources, Inc. v. STB, 109 F.3d 782, 789 (D.C. Cir. 1997) ("Shippers * * * if charged either a joint or proportional rate, must challenge the rate for the entire through movement; they cannot challenge individual segments.") (emphasis in original).

Nothing in the ICCTA indicates any intent to change this well settled rule. On the contrary, as indicated in the previous section, Congress clearly intended that the Board would apply the principles of the ICA to rate regulation in the noncontiguous domestic trades. Accordingly, if the Board concludes that GovGuam's complaint should not be dismissed in its entirety, it should at least dismiss the complaint to the extent it challenges only portions of joint intermodal rates.

B. GovGuam's Complaint Must Be Dismissed to the Extent That It Alleges That Defendant's Rates, Rules, and Practices Are Unlawful Because They Are Discriminatory.

If the Board concludes, contrary to the arguments in Part I above, that GovGuam's complaint should not be dismissed in its entirety, it should in any case dismiss the allegations in

Paragraphs 11 and 12 of the Complaint, challenging Defendants' rates, classifications, rules and practices as discriminatory, because the ICCTA repealed the ICA's prohibition of discrimination except as to rail carriers.

Paragraph 11 of the Complaint alleges that Defendants have "charged varying and unduly discriminatory rates for all transportation by water," and Paragraph 12 alleges that Defendants have "imposed unreasonable classifications, rules and practices on shippers in the Guam trade." Both of these actions are alleged to have resulted "in unreasonable preferences to certain shippers and commodities and unreasonable discrimination and prejudice against other shippers and commodities." The complaint does not indicate which of Defendants' rates, classifications, rules and practices have been discriminatory, and it gives no clue as to the nature of the alleged discrimination. Nor does the complaint explain how GovGuam can purport to represent and seek reparations for all shippers in the Guam trade if the assailed rates result in preferences to some of them. Answers to these questions are not needed, however, because it is clear that there is no legal basis for the charges. As the Board noted in Carolina Traffic Services of Gastonia, Inc. – Petition for Declaratory Order, STB No. 41689, 1996 STB LEXIS 189 at *10 (served June 7, 1996), the ICCTA specifically and deliberately repealed the antidiscrimination provisions of the ICA except as to rail carriers.

Former 49 U.S.C. § 10741(b) provided generally that common carriers subject to ICC jurisdiction "may not subject a person, place, port, or type of traffic to unreasonable discrimination." Critics of this provision argued that, in markets where competition existed, rules against "discrimination" tended to equalize rates and reduce competition between carriers. Thus both the ICC and DOT recommended repeal of this rule as to railroads and that the rates of

motor carriers be deregulated altogether.[42] Despite this, S. 1396 contained a provision, Section 321, that would have continued this provision and kept it applicable to all carriers subject to rate regulation. H.R. 2539, contained a provision, § 10541, that also would have retained the prohibitions of § 10741 but only as to rail carriers. The Conference Committee bill adopted the language of the House bill instead of the Senate bill on this provision. See H.R. Rep. 104-422 at 176 and 49 U.S.C. § 10741.

In short, the ICCTA deliberately repealed the antidiscrimination provisions of the ICA for all carriers other than rail carriers and thus eliminated any legal basis for the discrimination allegations in GovGuam's complaint.

C. The Two-Year Limitations Period for Damages in § 14705 Governs This Action, Requiring Dismissal of the Complaint Insofar As It Concerns Shipments Prior to September 10, 1996.

Section 14705 is the general provision on "Limitation on actions by and against carriers" that is applicable to all Part B carriers (motor carriers, water carriers, brokers, and freight forwarders). With respect to actions against carriers for unlawful actions, the provision sets out two potentially applicable limitations periods for complaints to the Board: (1) three years under

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[42] The 1994 ICC Study stated at pp. 30-31: "The rate antidiscrimination provisions have lost any practical utility, since in most cases one of the exceptions to the prohibition applies. . . . Moreover, collective, equalized ratemaking is a relic of the past, replaced by highly individualized pricing of rail services to individual shippers." Similarly, the 1995 DOT Report stated at p. 62: "This provision is a holdover from the pre-Staggers Act era when rate equalization was the norm, and carriers practiced collective ratemaking. It is an anachronism that runs contrary to the Staggers Act's emphasis on flexible and competitive ratemaking. It should be repealed."

b. to the extent it concerns each of the 554 individual rates of Defendant APL identified in Part III of the Argument (and the revenues resulting from each such rate), for the reasons set forth in Part III of the Argument.

Respectfully submitted,

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February 16, 1999

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ATTACHMENT NUMBER 3

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
Before The
SURFACE TRANSPORTATION BOARD

TERRITORY OF GUAM Complainant v. SEA-LAND SERVICE, INC. AMERICAN PRESIDENT LINES, INC. And MATSON NAVIGATION COMPANY, INC. Defendants	)	Docket No. WCC-101

ANSWER IN OPPOSITION
TO MOTION TO DISMISS COMPLAINT

Roger A. Berliner, Esq.
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On Behalf of the
Government of Guam

April 1, 1999

TABLE OF CONTENTS

IV. GOVGUAM IS ENTITLED TO CHALLENGE DEFENDANTS' RATES, CLASSIFICATIONS, RULES AND PRACTICES AS DISCRIMINATORY AND THEREFORE UNREASONABLE BASED ON THE LANGUAGE OF SECTION 13701(a).

While the specific anti-discrimination provision for motor carriers under the ICA was not included in ICCTA, a claim that rates, classifications, rules and practices are discriminatory and therefore unreasonable is clearly embraced by the language of § 13701(a). In fact, the language of paragraphs 12 and 13 of GovGuam's Complaint specifically challenges the reasonableness of Defendants' classifications, rules and practices and therefore states a claim under § 13701(a).

Section 13701(a) provides that a "rate, classification, rule or practice related to transportation or service provided by a carrier . . . must be reasonable." The word "reasonable" embraces a prohibition against discrimination by its definition. Discrimination means prejudicial treatment:[46] in order to be reasonable, rates classifications, rules and practices would have to be based on reason, not prejudices. Accordingly, Defendants' contention that a claim for discrimination under ICCTA no longer exists is too narrow a construction of the statute. An unreasonable practice could easily be a product of or result in discrimination. Nonetheless, as previously stated GovGuam's Complaint specifically challenges the reasonableness of Defendants' classifications, rules and practices and therefore states a claim under § 13701(a).

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be denied in its entirety as follows:

1. The Motion to Dismiss should be denied for the reason that GovGuam's complaint

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[46] Webster's New Collegiate Dictionary 324 (1980).

states a valid claim under ICCTA, as set forth in Part I of the Argument;

2. Defendants' Motion to Dismiss should also be denied for the reason that GovGuam has alleged a valid challenge to Defendants' port-to-port, joint and through rates under ICCTA, as set forth in Part II of the Argument;

3. Defendants' Motion to Dismiss should further be denied for the reason that GovGuam's claim is subject to a three year statute of limitations period which encompasses a valid challenge to all three Defendants' rates, as set forth in Part III of the Argument; and,

4. Finally, Defendants' Motion to Dismiss should be denied for the reason that GovGuam is entitled to challenge Defendants' rates, classifications, rules and practices as discriminatory, and therefore unreasonable, as set forth in Part IV of the Argument.

Respectfully submitted,

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ATTACHMENT NUMBER 4

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DHX, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MMM

DHX, INC.,

Plaintiff,

v.

CSX LINES, LLC and CSX LINES OF HAWAII, LLC and DOES 1 through 100, Inclusive,

Defendants.

CASE NO. 02-6740 (MANx)

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF AND DEMAND FOR JURY TRIAL

COMES NOW, Plaintiff DHX, Inc., by and through its counsel and alleges as follows:

PARTIES

1. Plaintiff DHX, Inc. is a corporation organized and existing under the laws of the State of California with its principal place of business located at 19201 S. Susana Road, Rancho Dominguez, California 90221.

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2. Plaintiff conducts business as a domestic freight forwarder more commonly known as a non-vessel operating ocean common carrier.

3. Plaintiff further engages in motor transportation service, warehousing and cross-dock freight services, cargo consolidation services, and freight brokerage.

4. Plaintiff conducts such aforementioned services in the domestic and international trades of the United States.

5. Defendant CSX, Lines, LLC is a limited liability corporation organized and existing under the laws of the State of Delaware.

6. Defendant CSX Lines, LLC maintains its corporate headquarters at 2101 Rexford Road, Charlotte, North Carolina 28221.

7. Defendant CSX Lines, LLC may be found in and conducts business within the Central District of California and does maintain corporate offices at 5000 East Spring Street, Long Beach, California 20815.

8. Defendant CSX, Lines of Hawaii, LLC is a business entity of unknown composition.

9. Plaintiff is informed and believes, and based thereon alleges, defendant CSX Lines of Hawaii, LLC maintains its corporate headquarters at 4100 Alpha Road, Suite 700, Dallas, Texas 75244. Plaintiff is informed and believes, and thereon alleges, that in committing the acts alleged herein, each and every defendant was the managing agent, agent, representative and/or employee of each and every other Defendants and was working within the course and

scope of said agency, representation and/or employment with the knowledge, consent, ratification and authorization of each and every remaining defendant and its directors, officers and/or managing agent.

10. All of the Defendants were acting together and in concert, entering into agreements with each other, and working as the principal, agent, employee of the other remaining Defendants and that each Defendant was aware of the acts of the others and consented to and ratified such acts.

11. Plaintiff is further informed and believes, and based thereon alleges, that a unity of interest in ownership existed between CSX Lines, LLC and CSX Lines of Hawaii, LLC such that any individuality and separateness that purportedly existed ceased and each Defendant became the alter ego of the others. Defendant CSX Lines of Hawaii, LLC, upon information and belief, is and represents itself as an alternative name and corporation under which CSX Lines, LLC conducts business. By and through this unity each Defendant asserted control over the other. Defendants conducted business jointly as co-owners, joint venturers or partners, and they have shared and inter-mingled joint management and capital and have dealt with Plaintiff jointly. Defendants share the same managers and officers, forms, offices, employees, policy and procedure manuals, and operating manuals.

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Jurisdiction and Venue

12. This Court has jurisdiction pursuant to the provisions of Sections 1331 and 1333 of Title 28 United States Code (2001 Supp.).

13. Venue is proper in this Court pursuant to 28 U.S.C. §1391(c) in that defendants may be found in and regularly conduct business within the Central District of California.

14. Defendant CSX Lines, LLC conducts business as a common carrier by water upon the high seas and the instant complaint does involve maritime contracts for ocean freight charges and as such is within the Admiralty jurisdiction of this Court.

15. Defendant CSX Lines, LLC as a common carrier is subject to all duties of a common carrier and is subject to the principles of federal common law and therefor this Court has jurisdiction pursuant to 28 U.S.C. §1331 as involving claims arising under the laws of the United States.

I.

COMMON LAW PRICE DISCRIMINATION

16. The averments of paragraphs 1 through 15 are incorporated herein as if set forth in full.

17. Defendant CSX Lines, LLC provides an ocean carrier transportation service in the United Stated domestic

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offshore and noncontiguous trades between points in the United Stated, Hawaii and Guam.

18. Defendant CSX Lines, LLC began its transportation on or about January 25, 2000 and has conducted such transportation services from that date to the present.

19. Defendant CSX Lines, LLC and a second ocean common carrier, Matson Navigation Company, Inc., provide the only vessel ocean Carrier transportation services between the west coast of the United States and the State of Hawaii.

20. Defendant CSX Lines, LLC and a second ocean common carrier, Matson Navigation Company, Inc., provide the only vessel ocean carrier transportation services between the west coast of the United States and the Territory of Guam.

21. Defendant CSX Lines, LLC and a second ocean common carrier, Matson Navigation Company, Inc., provide the only vessel ocean carrier transportation services between the State of Hawaii and the Territory of Guam.

22. Defendant CSX Lines, LLC and Matson Navigation Company, Inc. announced the joint usage of ocean vessels between the port of Los Angeles and the port of Honolulu, Hawaii on or about July 21, 2001 and, upon information and belief, both before and after July 21, 2001 they regularly transported each other's cargoes on their ships between points in the United States and Hawaii and the Territory of Guam.

23. Plaintiff DHX, Inc., is a customer and regular shipper in relation to Defendant CSX Lines, LLC and, at all times material to this Complaint, has utilized the

transportation services of CSX Lines, LLC between points or ports in the continental United States, on the one hand, and on the other points and ports in the State of Hawaii, Territory of Guam and between the State of Hawaii and the Territory of Guam.

24. Plaintiff, at various times and places, including at the offices in Rancho Dominguez, California, has requested that CSX Lines, LLC provide plaintiff with service rates and prices based upon volumes of cargoes tendered which are more commonly known as time volume and rates, service contract rates, and multiple container rates and pricing.

25. Defendant CSX Lines, LLC through its agents and employees at these meetings has declined to provide plaintiff such rates and pricing further representing that defendant does not engage in volume pricing nor provide shippers rates and prices that are based upon the volumes of cargoes tendered to defendant for shipment in the above identified United States domestic offshore and noncontiguous ocean trades between the continental United States, Hawaii and the Territory of Guam.

26. That, in September 1998, the Government of the Territory of Guam filed a complaint with the United States Department of Transportation, Surface Transportation Board, which alleged that Sea-Land Service, Inc. and Matson Navigation Company, Inc. as well as American President Lines, Ltd. had engaged in charging excessive rates on

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cargoes transported between the continental United States and the Territory of Guam.

27. That, on April 23, 2002, defendant CSX Lines, LLC submitted to the Surface Transportation Board, in conjunction with Matson Navigation Company, the sworn affidavits of Mr. Peter P. Wilson and Mr. Daniel Downes, true and correct copies of which are incorporated herein by this reference as Exhibit 1.

28. The sworn affidavits of Mr. Wilson and Mr. Downes were filed with the Surface Transportation Board and they disclose that defendant CSX Lines, LLC does in fact offer and does provide shippers with rates and prices based upon volumes of cargoes tendered to defendant as well as to Matson Navigation Company, Inc.

29. That the sworn affidavit of Mr. Downes further discloses the fact that Matson Navigation Company, Inc. and CSX Lines, LLC have a service agreement between Long Beach, California and Honolulu, Hawaii.

30. That, upon information and belief, defendant CSX Lines, LLC from at least January 25, 2000 to the date of this Complaint, has engaged in numerous instances of volume pricing contracts and time volume rate agreements with the other shippers that tender cargoes to CSX Lines, LLC for ocean transportation between the continental United States on the one hand, and on the other the State of Hawaii and Territory of Guam.

31. That, upon information and belief, plaintiff DHX ships the same or similar cargoes as and at volumes equal to

or higher than, the cargoes and volumes tendered to defendant CSX Lines, LLC by these other shippers. A representative list of these other shippers is attached hereto and identified as Exhibit No. 2.

32. That defendant CSX Lines, LLC has continuously represented to plaintiff that it will not offer nor provide to plaintiff the same rates and prices that defendant offers and provides to what defendant identified as "proprietary shippers" in the domestic offshore and noncontigous trades between the United States, on the one hand, and on the other, Hawaii and the Territory of Guam and between the State of Hawaii and the Territory of Guam.

33. That defendant CSX Lines, LLC, as a common carrier, is subject to a federal common law duty which obligates and requires it to treat all shipping customers equally pursuant to the ruling and holding of the United States Supreme Court and Western Union Telegraph Company v. Call Publishing Company, 181 U.S. 92 (1901).

34. That defendant, CSX Lines, LLC, knowingly, intentionally and willfully violated and breached its duty of common carriage to treat all similarly situated shipping customers equally and as a direct and proximate result, plaintiff has been made to pay rates and charges for ocean transportation services that are substantially greater than the rates and charges that defendant has assessed and collected from other similarly situated shipping customers.

35. That, as an example of its discrimination, defendant CSX Lines, LLC, at times material to this

Complaint, has offered and provided transportation services to shippers such as CostCo and Procter & Gamble Co. at rates and pricing less than those rates and charges assessed and paid by plaintiff.

36. That plaintiff, as a direct and proximate result of defendant CSX Lines, LLC's discriminatory and predatory conduct has been injured and damaged in the amount of approximately six million dollars ($7,000,000.00) from January 25, 2000 to the present.

II.

PUNITIVE DAMAGES

37. The averments of paragraph 1 through 36 are incorporated herein as if set forth in full.

38. That the actions of defendant CSX Lines, LLC are knowingly and intentionally contrary to law and industry practice in other domestic offshore and noncontiguous trades and are being engaged in by defendant with the purpose of excluding and reducing competition for ocean transportation services in the United States domestic offshore and noncontiguous ocean trades between the continental United States on the one hand, and on the other, the State of Hawaii and the Territory of Guam.

39. Defendant's conduct is and remain oppressive, willful and malicious and for the purpose of damaging plaintiff's lawful business and plaintiff is therefor,

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entitled to exemplary or punitive damages in an additional amount of twenty five million dollars ($25,000,000.00).

III.

INJUNCTIVE RELIEF

40. The averments of paragraph 1 through 39 are incorporated herein as if set forth in full.

41. That, upon information and belief, defendant has in the past and will continue in the future, its policy of rate and price discrimination against plaintiff and that injunctive relief is necessary and appropriate to obtain defendant's conformance to law.

42. That defendant has a common carrier duty to treat all similarly situated shippers fairly and equally and that in furtherance of that duty, defendant may not, directly nor indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, in the transportation of property, than defendant charges, demands, collects, or receives from any other person or persons for doing for him/her or them a like or contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions.

43. That defendant's common carrier duty includes the requirement that defendant afford plaintiff the access to

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the same rates and prices for defendant's services as it affords other shippers.

44. That defendant has violated its common carrier duty and will continue to fail to honor and adhere to the duties of common carriage required under federal common law and injunctive relief is therefor necessary and essential to obtain defendant's compliance with law.

45. Now therefore, plaintiff prays that the Court enter an order directing defendant CSX Lines, LLC, CSX Lines of Hawaii, LLC and other subsequently disclosed and identified name or entity under which defendant may be conducting business, to adhere to the common carrier duties states and contained in paragraphs 33 and 42 above and for such other and further relief as the Court deems appropriate to obtain and to maintain such compliance by defendant.

PRAYER

46. The averments of paragraph 1 through 45 are incorporated herein as if set forth in full.

47. Plaintiff hereby prays that the Court enter an order awarding plaintiff such damages as are to be determined by the court after hearing on this matter, but in a sum of not less than six million dollars ($7,000,000.00) as compensatory damages; and the sum of twenty five million dollars ($25,000,000.00) as punitive damages. The plaintiff further prays for an Order preliminarily and permanently enjoining the defendants as set forth in paragraph 45 above.

The plaintiff finally prays for such other and further relief as the Court deems just and appropriate in the circumstances, including all costs and reasonable attorneys' fees incurred by reason of this action.

DEMAND FOR JURY TRIAL

Plaintiff, on its own behalf hereby, demands a jury trial on all claims so triable in this action.

Dated: August 28, 2002

RONALD BECK, ESQ.
MICHEL F. MILLS, ESQ., Members of
PERONA, LANGER, BECK, LALLANDE & SERBIN
A Professional Corporation

Attorneys for Plaintiff DHX, Inc.

EXHIBIT 1

VERIFIED STATEMENT OF PETER P. WILSON

My name is Peter P. Wilson. I am General Manager Pricing of Matson Navigation Company, Inc. and have held that position since 1990. My responsibilities include setting the rates that Matson charges to transport cargo and supervising the tariffs, exempt circulars and government tenders through which Matson's rates are published. I have been employed by Matson since 1969. I began my career with Matson in the Law Department as a regulatory law attorney and became Manager Pricing in 1983. Prior to my employment with Matson, I was employed at the Federal Maritime Commission from 1965 to 1969. I have a B.A. degree in History and a law degree.

The offshore domestic trade to Guam is highly competitive. The only attempt by a carrier to take a general rate increase in recent years occurred in 1994, before Matson entered the trade, when APL filed a general rate increase. Sea-Land did not follow, forcing APL to withdraw the increase. Matson has not taken a general rate increase in the Guam trade.

Section 407 of the Interstate Commerce Commission Termination Act of 1995 required the Department of Transportation to prepare a report on competition in the noncontiguous domestic maritime trades. In its Report to Congress, completed in March of 1997, the Department concluded that aggregate freight revenue per container for the U.S. mainland to Guam trade in 1995 was less than 80 percent of the 1990 level, after adjusting for inflation. The Department also reported that there is fluid exit and entry into the Guam trade, partly due to the fact that there is no requirement that U.S.-built vessels be used to carry cargo to Guam from the U.S. mainland as there is in the other offshore domestic trades. Since 1972, seven carriers have entered the trade and five have exited.

The carriers in the Guam trade must match each other's rates in order to remain competitive. When Matson entered the trade in 1996, it adopted the rates published by American President Lines, Ltd. ("APL") and then made selective rate cuts in order to gain customers from the established carrier in the trade, Sea-Land Services, Inc. (now renamed CSX Lines) ("CSX"). Since entering the trade in 1996, Matson has taken approximately 3,400 separate rate actions. The vast majority of these rate actions have resulted in rate reductions. (Any increases were often merely passing through increased drayage and other expenses incurred by Matson to perform the service.) For example, on September 21, 1996, Matson reduced its rate for refrigerated containers by $200 and reduced its rated for mixed groceries by $100 on 20-foot containers and $250 on 40 and 45-foot containers. Matson has continued to reduce rates over the entire time that it has been in the Guam trade, either on its own initiative in attempt to gain cargo or in response to rate reductions by CSX. As examples, Matson reduced its rate for beer from $96 to $91.50 per 2000 pounds on September 28, 1996 and reduced its rate for non-alcoholic beverages from $85 to $80 per 2000 pounds on October 11, 1996. CSX matched the rate reductions that Matson initiated.

Competition is so strong in the Guam trade that Matson must match any rate reductions taken by CSX in order to retain cargo. Similarly, CSX is forced to match all rate reductions taken by Matson or lose the cargo. As a result, cargo often moves from one carrier to the other and then back again when the rate is matched. Matson is continually negotiating rates with its customers. CSX negotiated a rate with the military to carry U.S. Department of Defense cargo to Guam. Matson matched the rate in its Tariff 2048. Other examples of Matson matching a rate charged by CSX include the rate for animal feed moving out of Portland, Oregon. Matson added pet food to the items included in its foodstuffs, all kinds rate in order to be competitive with

CSX. Similarly, Matson matched CSX's rate and the items included in horticultural supplies. Matson matched CSX's rate action on household appliances in order to retain the business. Matson and CSX both have lowered the rate for various commodities at different times and temporarily gained the cargo until the other carrier matched the rate. Matson matched a CSX rate for paint, lacquer and, in turn, published a new rate for paint, lacquer that CSX then matched. Matson published point rates from several locations for mixed groceries and restaurant supplies, including foodstuffs, that were matched by CSX. CSX also matched Matson's rate for plastic pipe, while Matson matched CSX's rate for salt in bags and resin.

Matson publishes two tariffs in the Guam trade, Tariff Nos. 2045 and 44, which are filed with the Surface Transportation Board (STB), and two exempt circulars, Circular Nos. 7800 and 7600. In September, 1996, the STB-filed tariffs contained 292 separate commodity items, and the two exempt circulars contained 283 separate commodity items. The rates that Matson charges to carry dry cargo to Guam vary enormously. In September 1996, those rates ranged from $1,655 for moving a 40-foot container of for printing paper westbound to $14,000 for moving a container of PCB waste eastbound.

Many factors determine where within that range the rate for a particular commodity will fall. One obvious factor is the demand for the transportation. Another is the rates and services offered by other carriers in the trade for the same or similar commodities. Other factors include the cost of providing the services, the volume of cargo to which customers can commit and the value of the commodity. Matson generally charges more to carry valuable commodities, such as furniture or machinery, than it does to carry lower value commodities, such as animal feed or rice. All of these factors very greatly from commodity to commodity, and many of them can change quickly over relatively short periods of time. For example, demand for different services

or commodities has fluctuated tremendously with changes in tourism, U.S. military operations and general economic conditions. Since 1996, demand has generally declined, which has been reflected in the many rate reductions Matson has effected, described earlier.

Matson offers a variety of modes of service, from exclusively ocean carriage (container yard to container yard or CY-CY for short) to intermodal moves involving vessel and one or more other modes of transportation, such as rail or truck. In setting intermodal rates, Matson must consider the ocean freight rate that Matson currently charges for a similar commodity, wharfage charges at the applicable ports, the rail or motor carrier cost, origin drayage cost and any fuel surcharges.Many customers prefer that drayage from their warehouse to the terminal yard be included as part of the through rate. In that case, there is no longer a recognizable CY-CY charge but, instead, the participating carriers each receive a division of the through rate.

As noted earlier, the volume of cargo to which a customer can commit is also important in the rate setting process. Large shippers use their large volume of cargo to negotiate lower freight rates. A customer may commit business to Matson in order to receive a lower rate. Large volume shippers who have received favorable rates based on a volume commitment include Macy's (department store merchandise), Morrico (vehicles), Bensen-Do-It-Best (building materials), Xerox (duplicating machines), Ross (department store merchandise) and Dewitt (packing material). CSX has also been successful in securing the cargo of large shippers. Matson lost the Payless account to CSX last year and also lost the vast majority of the cargo shipped by Cost U Less. CSX carries all the Procter & Gamble shipments to Guam.

Matson frequently offers project rates for shippers who supply goods to a particular project, basing the rate on the size of the project and the projected number of containers that will be offered for transport. This is a highly competitive aspect of the Guam trade. Examples of

projects for which Matson has offered special rates include the Anderson Air Force Base Pipeline Project, the Dodea Schools Project, the Anderson Air Force Base 102 Unit Housing Project, the Army National Guard Armory Project and the Army Reserve Project. Matson lost the Tycom Project after CSX undercut the rates that Matson had negotiated.

Third parties, such as freight forwarders, can often obtain lower rates than the beneficial cargo owner could on his own because the freight forwarder has the ability to mix and match various commodities that he receives from his own customers. Shippers of over-dimensional cargo usually ask for a reduced rate and Matson will tailor a rate for a specific piece of equipment that will expire after the piece has been shipped.

The status of the customer can affect the rate that Matson charges. For example, the U.S. Department of Defense places limitations on rates. The U.S. Postal Service requires carriers to submit blind bids for cargo.

In my 37 years of experience, I have never known General Order 11 to be used to examine existing rate levels but only to assess proposed general rate increases.

VERIFICATION

I, Peter P. Wilson, verify under penalty of perjury, that the foregoing statement is true and correct. I further certify that I am qualified and authorized to file this statement.

Executed this 17th day of April, 2002.

Peter P. Wilson

Peter P. Wilson

VERIFIED STATEMENT OF DANIEL DOWNES

My name is Daniel Downes. I am employed as the Director of Marketing for CSX LINES, LLC's ("CSX") Hawaii - Guam Service.

OPERATIONAL INFORMATION, SCHEDULING AND ROTATION OF VESSELS IN THE HAWAII/GUAM SERVICE.

CSX operates five vessels in its service from the mainland to Guam. The five vessels operate on two strings. The first vessel string, designated the Pacific Express Service ("TP1") operates on a fixed weekly schedule with direct sailings from Tacoma every Sunday and Oakland every Wednesday. TP1 string vessels then sail to Honolulu (arriving the following Sunday). Vessels depart Honolulu the following Tuesday and arrive in Guam seven days later. The vessels then depart Guam and sail to Hong Kong and Taiwan before returning to Tacoma. Cargo loaded in the United States for ports beyond Guam in Asia is transported by Maersk-Sea-Land Lines and not by CSX. For example, the M/V CSX RELIANCE, voyage RG127W is scheduled to depart from Tacoma on June 23, 2002 and Oakland on June 26, 2002.[1] The vessel is scheduled to arrive in Honolulu on June 30 and in Guam on July 9, 2002. The M/V CSX RELIANCE is scheduled to depart from Guam on July 10 and will arrive in Hong Kong on July 13, 2002. The vessel will proceed to Kaohsiung, Taiwan on July 15, 2002 and is scheduled to return to Tacoma on July 26, 2002.

The second string designated the California Hawaii Express Service ("CHX") operates on a fixed weekly schedule with sailings from Oakland (every Wednesday) and Long Beach every

Saturday. CHX string vessels arrive in Honolulu every Wednesday where cargo destined for Guam is unloaded and relayed to TP1 string vessels for delivery to Guam and Saipan. The CHX vessel then returns to Oakland. For example, the M/V CSX Navigator voyage 167S is scheduled to depart from Oakland on June 12, and Long Beach on June 15. Cargo destined for Guam will be unloaded from the vessel upon its arrival in Honolulu on June 21, 2001. Subsequently, the Guam cargo will be loaded upon the M/V CSX RELIANCE, voyage RG127W, and track the schedule set out above. After unloading all its cargo in Honolulu, the M/V CSX Navigator will load any cargo destined from Hawaii to the mainland and will sail back to Oakland.

Additionally, CSX purchases space from Matson for CSX cargo moving from Long Beach to Guam. This service, which departs from Long Beach every Wednesday is, designated the mid-week express ("MWX") services. Cargo destined for Guam and Saipan is unloaded in Honolulu and relayed to the next Guam-bound TP1 vessel. CSX neither owns nor operates these vessels. A typical shipment from Long Beach is loaded in Long Beach on Wednesday and arrives in Guam 13 days later. For example, CSX cargo loaded on the M/V EVA, voyage EU171S will depart from Long Beach on June 26 and arrive in Honolulu on June 30, 2002. It will then be relayed to Guam on the M/V CSX RELIANCE, voyage RG127W, and arrive on July 9, 2002.

In each situation described above CSX is required to deal with a differing set of operational and ownership circumstances. In its TP1 string CSX transports cargo directly from the mainland to Guam without relay. Consequently, containers destined for Guam are only loaded and unloaded once from the vessel. This is the cargo equivalent of a direct flight. However, due to the nature of its agreement and chartering relationship with Maersk-Sea-Land

[1] CSX also accepts intermodal cargo from CSX rail and motor terminals throughout the mainland. These points include: Elizabeth, New Jersey; Jacksonville, Florida; Chicago, Illinois; Memphis, Tennessee; New Orleans,

("Maersk Lines"). CSX is only involved in the transportation of cargo to Guam, Saipan, Tinian and Rota. All cargo loaded on TP1 string vessels for non-U.S. destinations are transported by and for the account and expense of Maersk Lines. CSX does not transport cargo beyond Guam except for cargo that is transshipped by barge from Guam to Saipan, Tinian, and Rota..

Cargo moving to Guam on the CHX string is subject to unloading and relay in Honolulu. This is the cargo equivalent of changing planes at hubs in Atlanta, Chicago, or Charlotte. The cargo loaded on CHX string ships are, with the exception of cargo moving under slot charter with Matson to Hawaii, for the account of CSX. CSX is not involved in any long term chartering or vessel sharing agreement with Maersk Lines for vessels sailing between the mainland and Hawaii and back on this string. However, once CHX-string cargo is relayed to a TP1 string vessel for on carriage to Guam, that cargo is commingled with cargo moving subject to the economic and operational factors inherent in CSX's commercial relationship with Maersk Lines.

Cargo moving on the MWX is loaded onto a vessel on the mainland that is neither owned nor operated by CSX. Consequently, the economic factors inherent in the first leg of the voyage are those typically found in a simple slot chartering agreement. However, cargo destined to move beyond Hawaii for Guam is subject to relay on a TP1 string vessel at CSX's terminal in Honolulu.

Consequently, cargo shipped by CSX to Guam is shipped in a number of different ways on vessels that are subject to a wide array of operational and ownership scenarios.

Lastly, and as indicated above, CSX, not unlike most other carriers in the domestic and foreign liner trades have transitioned from a purely port-to-port service to a fully integrated intermodal point-to-point service. CSX accepts container loads of cargo for Guam at many intermodal points in the United States. An indication of the comprehensive nature of CSX's

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Louisiana; Houston, Texas;, and St. Louis, Missouri.

intermodal service is contained in the exemplar sailing schedules set out in Attachment A to this Statement.

TARIFF AND PRICING INFORMATION

As with any trade, the CSX tariff governing shipments from the United States to Guam contains a wide array of commodities. CSX does, in fact, transport a diverse cargo mix to Guam. A typical vessel will include containers of canned goods (including meats, fruits, and vegetable), snack foods, beverages (soda, beer, and fruit juice), automobiles and Sport Utility Vehicles, appliances, dry goods, building and construction material and household good and personal effects. Given the multitude of U.S.-origin points for cargo moving to Guam each active item in the CSX tariff is likely to reference a range of rates for each commodity depending upon the load point. For example, CSX maintains a port-to-port container rate for canned goods as well as numerous point-to port rates for container loads of canned goods original in, for example, Chicago, Seattle, Kansas City, Oklahoma City, and Cincinnati. Similarly, CSX maintains a multitude of point-to port intermodal rates for many commodities, whether rice, construction materials, lumber and building supplies that moves regularly in the trade or from that point.

Given the ever-changing intermodal locations, changing rail, and local truck rates, and various trade-wide conditions to which any carrier is subject (inconsistent demand, seasonal fluctuations in cargo volume, and economic down and up swings) the CSX lines tariff is consistently changing and evolving. In effect it is a dynamic document that reflects market trends, competition in the trade, sudden demands for space, large-volume cargo offerings and economic changes in general.

Daniel Downes

Subscribed and sworn to before me

this 23rd day of April, 2002.

Notary Public

My Commission expires on March 29, 2011

EXHIBIT 2

SHIPPERS FOR WHICH CSX LINES, LLC HAS PROVIDED RATES AND SERVICES AT LEVELS LOWER THAN WHAT HAS BEEN PAID BY COMPLAINANT.

This is a representative list only.

Sam's Warehouse Stores
Costco
Fleming Foods
Eagle Hardware
Hunt Wesson
Proctor & Gamble
Oreintal Supermarket
Kellogs
Ocean Spray Products
Wal-Mart
Neiman Marcus
K-Mart
Lipton Foods
Honlulu Freight Service

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ATTACHMENT NUMBER 5

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CSX LINES LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DHX, INC., Plaintiff, v. CSX LINES, LLC and CSX LINES OF HAWAII, LLC and DOES 1 through 100, Inclusive, Defendants.	CASE NO.: CV 02-6740 RJK (MANx) **DEFENDANT CSX LINES LLC'S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT** Date: October 28, 2002 Time: 10:00 a.m. Courtroom: 840-Roybal Bldg. Hon. Robert J. Kelleher

PLEASE TAKE NOTICE that on October 28, 2002, at 10:00 a.m., or as soon thereafter as the matter may be heard in Courtroom 840 of the above-entitled Court located at Edward R. Roybal Center & Federal Building, 255 E.

Temple Street, Los Angeles, California, defendant CSX Lines will move the Court for an Order that the instant complaint be dismissed, pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure and the local rules of this Court.

This Motion is made following the conference of counsel pursuant to Local Rule 7-3 of the Central District of California which took place on September 27, 2002.

This Motion is based upon this Notice of Motion and Motion To Dismiss, the Memorandum of Points and Authorities And Exhibits Thereto filed and served with this Notice, as well as the Court's file, including the Complaint in this matter, and all matters presented to and considered by the court at oral argument.

The grounds for this Motion are the following:

1. The Court lacks subject matter jurisdiction over the dispute described in the complaint, exclusive jurisdiction over which lies with the Surface Transportation Board, an agency of the United States designated by Congress to resolve disputes over rates and practices charged by regulated water carriers;

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2. The complaint fails to establish federal question jurisdiction in this Court under 28 U.S.C. § 1331;

3. The complaint rests on invocation of a "federal common law" theory of action. There is no "federal common law" applicable to the averments in the complaint;

4. The complaint fails to state a claim upon which relief can be granted; and,

5. The admiralty jurisdiction of the United States is not implicated by the averments of the complaint.

For the reasons set forth in this motion and the accompanying

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Memorandum of Points and Authorities, CSX therefore requests this Court to dismiss the complaint.

Respectfully submitted,

FLYNN, DELICH & WISE

Dated: October 7, 2002

By: _____
Erich P. Wise
Alex H. Cherin
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PROOF OF SERVICE BY PERSONAL SERVICE AND OVERNIGHT MAIL

STATE OF CALIFORNIA, COUNTY OF LONG BEACH

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is One World Trade Center, Suite 1800, Long Beach, California, 90831.

On October 7, 2002, I served the foregoing document (on recycled paper) described as **DEFENDANT CSX LINES LLC'S NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Michel F. Mills **(PERSONAL SERVICE)**
Ronald Beck
PERONA LANGER BECK LALLANDE
& SERBIN
300 East San Antonio Drive
Long Beach, California 90807-0948
Fax: 562/490-9823

Courtesy Copy To: **(FEDERAL EXPRESS-OVERNIGHT MAIL)**

C. Jonathan Benner
Leonard L. Fleisig
TROUTMAN SANDERS LLP
401 9th Street, N.W. – Ste. 1000
Washington, D.C. 20004-2134
Fax: 202/654-5647

[X] (By Federal Express-Overnight Mail): I deposited such envelope in Federal Express drop box located at One World Trade Center, Long Beach, California, for next day delivery.

[X] (By Personal Service): I caused such envelope to be delivered by hand to the offices of the addressee(s) above.

EXECUTED ON October 7, 2002, at Long Beach, California.

[X] (Federal): I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Jacqueline Araujo

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DHX, INC., Plaintiff, v. CSX LINES, LLC and CSX LINES OF HAWAII, LLC and DOES 1 through 100, Inclusive, Defendants.	CASE NO.: CV 02-6740 RJK (MANx) **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS** Date: October 28, 2002 Time: 10:00 a.m. Courtroom: 840-Roybal Bldg. Hon. Robert J. Kelleher

TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Page(s) No.

JUDICIAL DECISIONS

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ADMINISTRATIVE DECISIONS

STATUTES

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RULES OF PROCEDURE

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Defendant CSX Lines, LLC ("CSX Lines"), submits this Memorandum of Points and Authorities in support of its Motion to Dismiss. The Motion suggests that this Court lacks subject matter jurisdiction over the dispute described in the Complaint. The Motion further asserts the absence of both admiralty and federal question jurisdiction and, finally, asserts that the Complaint fails to state a claim upon which relief can be granted.

I. BACKGROUND

This matter arises from an ongoing commercial dispute between Plaintiff DHX, Inc. ("DHX"), and CSX Lines over the latter water carrier's rates and practices in the domestic ocean trades between the mainland United States and the Hawaiian Islands. In other manifestations of the disagreement, DHX has filed a complaint and an amended complaint against CSX Lines and a predecessor carrier, Sea-Land Service, Inc. ("Sea-Land") before the Surface Transportation Board ("the STB"), the federal agency charged by Congress to hear such disputes.[1] That action is in the discovery phase. In the instant matter before this Court, DHX advances nearly identical allegations, but instead of alleging violations of federal statutes, it contends that CSX Lines' rates and

[1] *DHX, Inc. v. Matson Navigation Co. and Sea-Land Service, Inc.*, STB Docket No. WCC-105 (*"DHX v Matson and Sea-land"*). In its amended complaint filed with the STB on April 29, 2002, DHX named CSX Lines as a defendant. It also expanded the complaint to cover matters to and including April 29, 2002, overlapping the dates at issue in this matter. A copy of DHX's Amended Complaint (without exhibits) thereto is attached as Exhibit "A" to this memorandum. CSX Lines requests that the Court take judicial notice of the

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practices violate "federal common law" prohibitions against "discrimination" by a common carrier.

DHX acknowledges that it is a freight forwarder and non-vessel operating common carrier ("NVOCC"),[2] Complaint, ¶ 2, offering transportation services in the domestic offshore trades (*i.e.*, between the contiguous United States and other U.S. points such as Hawaii). Complaint, ¶¶ 5 and 23. CSX Lines, as DHX asserts, is an ocean carrier, transporting goods between the contiguous United States, Hawaii and Guam. Complaint, ¶ 18.

DHX filed its Complaint against CSX Lines, "CSX Lines of Hawaii, LLC" (an entity unknown to defendant) and unnamed Doe defendants, seeking in Count I compensatory damages for "common law price discrimination." Complaint, ¶¶ 5-9, 18-36. In Count II of the Complaint, DHX seeks punitive damages for the defendants' alleged attempts to damage DHX's business by charging DHX rates higher than those charged to certain shippers. Complaint,

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contents of this amended Complaint (without exhibits) pursuant to Rule 201 of the Federal Rules of Evidence.

[2] The terms "non-vessel operating common carrier" and "NVOCC" are creatures of the regulatory programs and federal statutes administered by the Federal Maritime Commission ("FMC"). They have no present statutory meaning and are seldom used in cases arising under the ICC Termination Act of 1995, the statute which the STB administers, or its predecessor the Interstate Commerce Act. Rather, the STB uses the statutory term "freight forwarder" to describe a shipping intermediary such as DHX. *See* 49 U.S.C. § 13102(8) (2000). The key characteristics of such entities are that they solicit cargo from shippers for carriage and assume bill of lading responsibilities for the movement of the goods. They are carriers vis-à-vis their customers and compete with vessel operators like CSX Lines for the business of shippers. To procure the physical movement of goods for which they issue bills of lading,

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¶¶ 37-39. In Count III, Plaintiff asks the Court to issue an injunction, apparently ordering CSX Lines to charge DHX the same rates charged other shippers. Complaint, ¶¶ 40-45.

The core of DHX's complaint is found in paragraphs 33 through 35. There, DHX avers that CSX Lines "is subject to a federal common law duty which obligates and requires it to treat all shipping customers equally," citing only *Western Union Telegraph Company v. Call Publishing Company*, 181 U.S. 92, 21 S. Ct. 561, 45 L. Ed. 765 (1901) ("*Western Union*"), an early telegraph rate case. CSX Lines has, DHX claims, breached this duty, causing DHX to pay rates and charges higher than those charged to, for example, Costco and Procter & Gamble. Complaint, ¶¶ 34-35. DHX also attaches to its Complaint a list of fourteen shippers whom it contends have received preferential treatment on rates.

II. LEGAL STANDARDS GOVERNING MOTION TO DISMISS

Federal courts are courts of limited jurisdiction. Every case is presumed to fall outside a federal court's jurisdiction unless proven otherwise. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 376-78, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994). The plaintiff bears the burden of proof to establish that jurisdiction exists. *Thornhill Pub. Co., Inv. v. General Tel. & Electronics*

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forwarders (or NVOCC's in former FMC parlance) pay for the use of vessels operated by water carriers such as CSX Lines.

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Corp., 594 F.2d 730, 733 (9th Cir. 1979). Accordingly, under Federal Rule of Civil Procedure 12(b)(1), a motion to dismiss for lack of subject matter jurisdiction may be granted if the plaintiff does not meet its burden in establishing that the federal court has such jurisdiction. If it appears that the court lacks subject matter jurisdiction, the court is obligated to dismiss the action. *See* Fed. R. Civ. P. 12(h)(3).

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the Complaint. A court may not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). Dismissal is proper where there is either a "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *See Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988). *See also Warren v. Fox Family Worldwide, Inc.*, 171 F. Supp. 2d 1057, 1061 (C.D. Cal. 2001). A court must accept all factual allegations pleaded in the complaint as true, and must construe them and draw all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1995). A court need not, however, accept as true unreasonable inferences or conclusory legal allegations cast in the form of factual allegations. *Western*

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Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981), *cert. denied* 454 U.S. 1031, 102 S. Ct. 567, 70 L. Ed. 2d 474 (1981).

A review of a motion to dismiss is generally confined to the four corners of the complaint and the court may not consider material outside the pleading. However, a court may consider matters that may be judicially noticed pursuant to Federal Rule of Evidence 201 without converting a motion to dismiss into a motion for summary judgment. In the instant case, the Court may take judicial notice of the rulings and pleadings filed at the Surface Transportation Board concerning this matter. See e.g. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (court may take judicial notice of records and reports of administrative bodies); *Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 136 F.3d 1360, 1364 (9th Cir. 1998) *cert. denied*, 525 U.S. 873, 119 S. Ct. 173, 142 L.Ed.2d 141 (1998)(a court also may take judicial notice of pleadings filed in other actions).

III. FEDERAL STATUTORY REMEDIES NEGATE JURISDICTION BASED ON "FEDERAL COMMON LAW" DISCRIMINATION

DHX asserts that its claim is grounded in "federal common law," and therefore is within the Court's federal question jurisdiction under 28 U.S.C. § 1331. Congress long ago gave the STB and its predecessor pervasive statutory authority to regulate rates and practices for ocean transportation. *See*

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49 U.S.C. § 13701(a)(2000). Because of the need for uniformity of regulation, that authority completely occupies the field of regulating carrier rates and practices.

Federal common law cannot support federal question jurisdiction if Congress has superseded such a common law claim. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-314, 101 S. Ct. 1784, 68 L. Ed. 2d 114 (1981) ("*City of Milwaukee*"); *Western Union* at 102.

The concept that there exists a body of "federal common law" is subject to debate. *See, e.g., Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).[3] Whether a common law cause of action for discrimination by a carrier ever existed is even more dubious. *See generally American Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe R. Co.*, 387 U.S. 397, 406, 87 S. Ct. 1608, 18 L. Ed. 2d 847 (1967):

> From the earliest days, common carriers have had a duty to carry all goods offered for transportation. Refusal to carry the goods of some shippers was unlawful. Rates were required to be reasonable, *but discrimination in the form of unequal rates as among shippers was not forbidden.*

[3] *See also Sederquist v. Court*, 861 F.2d 554, 556 (9th Cir. 1988): "Not every principle of law or equity, not enshrined in a federal statute or regulation, employed by a federal court becomes 'federal common law.' Federal courts often draw upon the ubiquitous legal culture in which they function to resolve various issues without either cataloging the principle utilized or incorporating it into the federal common law. To hold otherwise would infinitely expand federal jurisdiction."

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(Emphasis added). In *Cowden v. Pacific Coast Steamship Co.*, 94 Cal. 470, 29 P. 873 (1892), the Supreme Court of California examined the history of common law to determine whether a merchant had stated a recognizable claim when he alleged that a carrier discriminated against him by charging him more than a second merchant for the shipment of similar goods. The Court concluded that although the common law required a rate to be reasonable, it did not recognize the merchant's claim for discrimination because common carriers were under no obligation to charge the same rate to all shippers. *See id.* at 480. The claimed cause of action here is particularly suspect when DHX's status as a competitor of CSX Lines is considered.[4]

Even if a "federal common law" claim for discrimination did exist, it could only serve as a basis for this Court's jurisdiction if it were consistent with subsequent Congressional enactments. *City of Milwaukee* at 314. The statutory authority that Congress granted the STB over ocean carrier rates in the non-contiguous domestic trades is inconsistent with the preservation of parallel remedies in other fora. Congress granted the STB exclusive authority to regulate rates and practices of ocean carriers in the noncontiguous domestic trades. 49 U.S.C. § 13701, *et seq.* (2000). *See also Sea-Land Service v. Atlantic Pacific International,* 61 F. Supp. 2d 1102 at 1113 (D.C. Haw. 1999)

[4] "DHX competes with the defendants for traffic that defendants could themselves solicit." *DHX v. Matson and Sea-Land* at *5.

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("*Sea-Land Service v. Atlantic Pacific*"). Under this regulatory regime, CSX Lines' rates, along with related rules and practices, are stated in tariffs. *See* Exhibit 1 to the Complaint at 10. Those tariffs are filed with the STB, *see* 49 U.S.C. § 13702(b)(1) (2000), and CSX Lines is required to adhere to those tariffs. 49 U.S.C. § 13702(a) (2000). The STB has exclusive authority to determine whether those rates or practices are reasonable, 49 U.S.C. § 13701(a) (2000), and to prescribe the rate, rule or practice to be applied if they are not. 49 U.S.C. § 13701(b) (2000). Rate reasonableness is inextricably linked to the concept of alleged discrimination.[5]

Rate regulation requires uniformity of treatment and the experience and knowledge of an expert body:

> "Rate reasonableness is an area where uniformity and agency knowledge are essential to a proper result. Thus district courts should refrain from deciding issues related to the reasonableness or claimed discriminatory effect of a filed rate when the STB has jurisdiction to do so.

Sea-Land Service v. Atlantic Pacific at 1113.[6] Because of this need for uniformity, federal statutes occupy the field with respect to control of CSX Lines' filed rates.[7]

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[5] *See also Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 at 440 (1907), and *MCI TEL. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 230, 114 S. Ct. 2223, 129 L.Ed. 2d 182 (1994) (holding that there is an "indissoluble unity" between reasonableness of filed rates and alleged discrimination).

[6] *See also Hargrave v. Freight Distribution Service, Inc.*, 53 F.3d 1019, 1021-1022 (9th Cir. 1995); *United States v. Alaska S.S. Co.*, 110 F. Supp. 104 (W.D.

Filed rates have the force of law.[8] The exclusive means of obtaining relief from a filed rate is to pursue a statutory cause of action before the STB.[9] Carriers' rates and practices in the domestic offshore ocean trades are within the STB's exclusive primary jurisdiction.[10] Matters like this which fall within the STB's primary jurisdiction must be handled by that agency, with the right of

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Wash. 1952) ("*U.S. v. Alaska S.S.*"); and *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, 196, 33 S. Ct. 893, 57 L.Ed. 1446 (1913) ("Under the statute there are many acts of the carrier which are lawful or unlawful according as they are reasonable or unreasonable, just or unjust. The determination of such issues involves a comparison of rate with service, and calls for an exercise of the discretion of the administrative and rate-regulating body. For the reasonableness of rates, and the permissible discrimination based upon difference in conditions are not matters of law.").

[7] *See Southern Ry. v. Reid*, 222 U.S. 424, 438, 440, 32 S. Ct. 140, 56 L.Ed. 257 (1912) ("Congress has taken control of the subject of rate making and charging. . . . [T]he subject is taken possession of."); *RTC Transportation, Inc. v. Motor Carrier Audit & Collection Co.*, 971 F.2d 368, 372 (9th Cir. 1992) (the ICC had "exclusive primary jurisdiction" to determine rate reasonableness).

[8] *Chaplin v. Greyhound Lines*, 1995 U.S. Dist. LEXIS 9478 at *9 (N.D. Cal. 1995).

[9] *Ocean Logistics Management, Inc. v. NPR, Inc.*, 38 F.Supp.2d 77, 82 (D. P.R. 1999) ("*Ocean Logistics*") ("Causes of action based upon rates filed by carriers in regulated transportation industries must be remitted to the regulating agencies created for exclusive application of the remedies established by Congress under the regulatory statutes. . . . Th[is] 'filed-rate doctrine' . . . has accordingly been held to preempt all complaints charging that rates filed with regulatory agencies under comprehensive regulatory systems are illegal.") and *Louisville & N. R. Co. v. Maxwell*, 237 U.S. 94, 97, 59 L.Ed.853, 35 S. Ct. 494 (1915) ("Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. . . . [T]he carrier must abide by it, unless it is found by the Commission to be unreasonable."). *See also Keough v. Chicago & N.W. Ry.*, 260 U.S. 156, 163, 67 L.Ed.183, 43 S. Ct. 47 (1922); *Maislin Industries, U.S., Inc. v. Primary Steel*, 497 U.S. 116, 126, 110 S. Ct. 2759, 111 L.Ed.2d 94 (1990).

[10] *Ocean Logistics* at 83-84 (D. P.R. 1999).

direct judicial review by the Courts of Appeals mandated by the Hobbs Act.[11] To hold otherwise would allow courts, rather than the STB, to regulate ocean carriers' rates,[12] in conflict with Congress' plan for uniform and expert rate regulation.

Other types of actions, whether based on antitrust law,[13] common law[14] or otherwise[15] are preempted.[16] Savings clauses like 49 U.S.C. § 13103 do not preserve or create supposed common law challenges to filed rates.[17]

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[11] *See* 28 U.S.C. § § 2321 and 2342(5) (2000).

[12] *G. & T. Terminal Packaging Co., Inc. v. Consolidated Rail Corp.*, 646 F. Supp. 511, 518 (D. N.J. 1986), *aff'd* 830 F.2d 1230 (3d Cir. 1987), *cert. denied*, 485 U.S. 988, 108 S. Ct. 1291, 99 L. Ed. 2d 501 (1988) (*"G&T Terminal"*) (to allow discrimination claim would put courts in the position of regulating carrier rates rather than the ICC); *United States v. SCRAP*, 412 U.S. 669, 691 (1973) (court's injunctive power with respect to filed rates is extinguished by "exclusive power of the Commission to suspend rates").

[13] *See Far East Conference v. United States*, 342 U.S. 570 (1952); *U.S. v. Alaska S.S* (both rejecting antitrust suits against ocean carriers in favor of the primary jurisdiction of the Federal Maritime Board).

[14] *Alliance Shippers, Inc. v. Southern Pacific Transp.*, 858 F.2d 567, 569 (9th Cir. 1988) (common law discrimination claim against railroad rates is preempted); *Quasar Company v. The Atchison, T. & S.F. Ry.*, 632 F. Supp. 1106, 1110 (N.D. Ill. 1986) (regulation by the ICC preempts common law claims that conflict with such regulation).

[15] *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998) (*"AT&T"*) (reversing Ninth Circuit decision and dismissing tort and contract claims against a regulated telephone company, based on the filed rate doctrine of the Communications Act that parallels the filed rate doctrine under the ICC Termination Act).

[16] *See Kasza v. Browner*, 133 F.3d 1159, 1177 (9th Cir. 1998) (Tashima, J., concurring), *cert. denied* 525 U.S. 967, 119 S. Ct. 414, 142 L. Ed. 2d 336 (1998) ("[A] comprehensive regulatory statute can preempt well-established federal common law without even mentioning the common law rules preempted.")

[17] *Adams Express v. Croninger*, 226 U.S. 491, 507, 33 S. Ct. 148, 57 L.Ed.314 (1912) (state law claim for freight damage is not preserved by savings clause because it is inconsistent with federal regulation of the subject); *AT&T*

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Congress' establishment and later abolition of statutory discrimination remedies for freight forwarders also demonstrates Congress' intent to preclude rate discrimination claims. The anti-discrimination provisions of Section 2 of the original Interstate Commerce Act were considered a cornerstone of that statute. *See Interstate Commerce Commission v. Cincinnati, New Orleans & Texas Pacific Ry.*, 167 U.S. 479, 494, 17 S. Ct. 896, 42 L.Ed. 243 (1897). These provisions were extended to domestic water carriers in 1940[18] and, prior to 1986,[19] former 49 U.S.C. § 10741 specifically protected freight forwarders like DHX:

> A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I, II or III of that chapter may not subject a freight forwarder providing service subject to the jurisdiction of the Commission under subchapter IV of that chapter to unreasonable discrimination.[20]

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at 227-228 (savings clause in Communications Act does not overcome filed-rate doctrine to allow tort or contract-based claims); *Cleveland v. Beltman North American Co.*, 30 F.3d 373, 379 (2d Cir. 1994), and *Overbrook Farmers Cooperative Assoc. v. Missouri Pacific R. Co.*, 21 F.3d 360, 364 (10th Cir. 1994) (punitive damage remedies are inconsistent with statutory claims for freight damage and regulation of railroad service).

[18] 54 Stat. 898, 934-935, § 305.

[19] Pub. L. 99-521, 100 Stat. 2993.

[20] A water carrier offering through service with a motor carrier for transportation to Hawaii, for example, was subject to ICC jurisdiction under subchapter III, former 49 U.S.C. § 10541, *et seq.* Although not directly applicable here, the Court should be aware that water carriers providing purely port-to-port services were subject to similar proscriptions in the Shipping Act, 1916. The ICC Termination Act of 1995 consolidated at the STB all federal regulatory authority over rates and practices of water carriers in the noncontiguous domestic trades.

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In 1986, this protection was restricted solely to freight forwarders of household goods, and has no application to the instant Complaint.

The ICC Termination Act of 1995[21] further reorganized the statute, retaining anti-discrimination provisions applicable to railroads in Part A[22] and to pipelines in Part C,[23] but eliminating them from Part B, which applies to motor carriers, water carriers (such as Defendant CSX Lines) and freight forwarders. In addition, 49 U.S.C. § 13702(b)(4) expressly permits discrimination. As the district court in Hawaii put it:

> [F]ederal legislation that governs water carriers . . . in the non-contiguous domestic trade does not expressly prohibit rate discrimination; to the contrary, it allows carriers to engage in price discrimination under certain circumstances. For example, water carriers can discriminate among shippers based on the volume of cargo offered over time. 49 U.S.C. § 13702(b)(4) (2000).

Sea-Land Service v. Atlantic Pacific at 1112.

Claims such as DHX's, which are based on rate comparisons, are also subject to the STB's rate reasonableness jurisdiction, further illuminating the inconsistency of this suit with Congress' statutory scheme for regulation of domestic offshore rates. *Georgia-Pacific Corporation--Petition for Declaratory Order--Certain Rates and Practices of Oneida Motor Freight, Inc.*,

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[21] Pub. L. 104-88, 109 Stat. 803 (codified at 49 U.S.C. § 10101, *et seq.*).

[22] 49 U.S.C. § 10741 (2000).

[23] 49 U.S.C. § 15506 (2000).

9 I.C.C.2d 1052 (1992), *aff'd Oneida Motor Freight v. Interstate Commerce Commission*, 45 F.3d 503 (D.C. Cir. 1995), reviews the historical development of rate reasonableness methodology, focusing on the use of rate comparisons as a means to determine rate reasonableness. The STB continues to use this methodology today in rate reasonableness cases.[24]

The pendency and similarity of DHX's complaint against CSX Lines at the STB confirms that DHX's remedy, if any, lies at the STB. As the agency noted, while DHX complained of particular rates, its central complaint seems to be that Sea-Land and CSX Lines were competing unfairly with DHX.[25] Similarly, DHX here complains that CSX Line's practices "are being engaged in by defendant with the purpose of excluding and reducing competition for ocean transportation services." Complaint, ¶ 38.

A paragraph-by-paragraph comparison supports CSX's assertion that this complaint represents nothing more than an attempt to find an additional forum to litigate the exact same grievance. In other words this lawsuit represents nothing more than a forum-shopping attempt by plaintiff to hedge its bets in the

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[24] *The TJX Companies, Inc.--Petition For Declaratory Order--Certain Rates And Practices Of Sweeney Transportation, Inc., And Knickerbocker East-West, Inc.*, Docket No. 41192 (STB, served Sept. 20, 2002).

[25] *See DHX v. Matson and Sea-Land Service, Inc. STB Docket No. WCC-105, 2001 STB LEXIS 998* at *12 (Dec. 21, 2001).

event that it does not prevail in the forum specifically designed to hear its complaints about CSX's regulated activities.

Amended Complaint - S.T.B	U.S.D.C. N.D. Cal. : CV 02 6740 RJK
¶ 239. Complainant, at all times material to this complaint, has requested Sea-Land/CSX to make available to Complainant rates based upon volume of cargo shipped, including long term arrangements for shipping Complainant's freight in the Hawaii trade.	¶ 24. Plaintiff, at various times and places, including at the offices in Rancho Dominguez, California, has requested that CSX Lines, LLC provide plaintiff with service rates and prices based upon volumes of cargo tendered which are more commonly known as time volume and rates [sic], service contract rates, and multiple container rates and pricing.
¶ 241 Sea-Land/CSX has represented to Complainant that Sea-Land/CSX does not offer, provide nor participate in any form of volume pricing arrangements, including time volume rates, loyalty contracts or other service contracts.	¶ 25. Defendant CSX Lines, LLC through its agents and employees at these meetings has declined to provide plaintiff such rates and pricing further representing that defendant does not engage in volume pricing nor provide shippers rates and prices that are based upon the volumes of cargoes tendered to defendant for shipment in the above identified Untied States domestic offshore and noncontiguous ocean trades . . .
¶ 248. Complainant, by reason of Sea-Land/CSX's mis-representations and failure to publically [sic] disclose all terms and conditions of service, states that Sea-Land/CSX has violated 13701(a) and 13702(b)(1), 49 U.S.C. , and Complainant has been damaged thereby.	¶ 36 That plaintiff, as a direct and proximate result of defendant CSX Lines, LLC's discriminatory and predatory conduct has been injured and damaged in the amount of approximately six million ($7,000,000.00) [sic] from January 25, 2000 to the present.

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If the Court accepts DHX's invitation to entertain the case on its merits, the Court would invade the STB's statutory jurisdiction to determine the reasonableness of carrier rates and practices in the noncontiguous trades. "Recognizing a judicial common law cause of action for discriminatory rates would in effect give license to *de facto* judicial regulation over common carrier rates."[26] In particular, Count III of DHX's complaint asks the Court to command CSX Lines to charge DHX only certain (albeit unspecified) rates. DHX invites the Court to take over the STB's function of determining what rates and practices are reasonable and lawful. Doing so would conflict directly with the ICC Termination Act of 1995. The Court should decline DHX's invitation.

Fundamentally, DHX is claiming that it is being charged too much, as judged by the rates CSX Lines charges to shippers whose business is sought by both carriers. This claim implicates the jurisdiction of the STB. DHX's pursuit of this claim while simultaneously pursuing recovery at the STB for the same acts intrudes on the STB's authority to handle its docket and raises the possibility of inconsistent dispositions of what is essentially the same claim. The Court should dismiss this case because federal statutory law leaves no room for a "federal common law" claim that CSX Lines has unlawfully discriminated against DHX in CSX Lines' rates and practices.

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[26] *G. & T. Terminal* at 518.

IV. DHX FAILS TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED

Assuming, arguendo, that there were a federal common law cause of action for discrimination by an ocean carrier based on *Western Union*, DHX has failed to state a claim even under the reasoning of that case. Specifically, DHX has failed to plead, much less show, that it is a competitor of the allegedly favored shippers. Failure to allege competitive harm vitiates DHX's complaint of unlawful discrimination.

Competitive harm is the core of a shipper's complaint for discrimination by a common carrier. Under former 49 U.S.C. § 10741, the elements of a discrimination case were (1) that a rate disparity existed, (2) that the complaining party was competitively injured vis-à-vis a preferred rate payor, (3) that the same carrier established both the prejudicial and the preferential rates, and (4) that the disparity in rates was not justified based on a difference in transportation conditions. The carrier bore the burden of proof on the fourth point once the complainant established the other elements.[27]

This same scheme apparently applied under the sole authority DHX cites for its claim, *Western Union*. *Western Union* involved a claim by the publisher of *The Lincoln Daily Call* that the telegraph company was charging Call more than it was charging a competing publisher, The State Journal Company, for

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transmission of wire copy from the Associated Press. In recitation of the jury instruction on which the case turned, the Supreme Court quoted the lower court as stating:

> [T]he Call Publishing Company has certain legal rights. It embarks in an enterprise in the city of Lincoln. *It has for a competitor the State Journal Company*, and perhaps others. *In its race for success, it ought not to be unfairly handicapped. . . . . In fixing its charges to these two competing companies for these dispatches it is the duty of the telegraph company not to unjustly discriminate.* [Emphasis added.]

Western Union at 98. Thus, competitive harm is the crux of even the supposed common law discrimination action that DHX touts.[28]

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[27] *See Dresser Industries, Inc. v. Interstate Commerce Commission*, 714 F.2d 588, 598 (5th Cir. 1983).

[28] After analyzing decisions in both the United States and England addressing common law claims for discrimination, the Supreme Court of Texas concluded that at common law, equality of rates was not required common carriers. *United Gas Corp. v. Shepherd Laundries Co., Inc.*, 144 Tex. 164, 171-72, 189 S.W.2d 485 (Tex. 1945). In the United States, however, courts created an exception to this common law rule, requiring "equality in rates *between competitors in business*, . . ." *Id.* (emphasis added); *see also id.* at 172-73 (referencing various American legal treatises and cases supporting this principle). As the court explained:

> The American exception requires equality where the favored and disfavored parties are competitors in business . . . In each of the cases developing the American rule the court had before it a complaint as to inequality of rates as *between competing shippers or customers*. The giving of preferential rates thus gave the favored party an advantage in trade, enabling him to undersell others or to increase his profits and ultimately destroy competition and create a monopoly in his particular field. *Id.* at 172.

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While DHX claims that CSX Lines seeks to reduce competition in the domestic offshore trades, that allegation does not satisfy the competitive harm element of the test set out in *Western Union*. DHX's complaint here, as at the STB, is that CSX Lines is attempting to harm DHX's business so DHX cannot compete effectively with CSX Lines. As a forwarder or NVOCC, DHX clearly is a competitor of CSX Lines. *DHX, Inc. v. Matson Navigation Company and Sea-Land Service, Inc.*, STB Docket No. WCC-105, 2001 STB LEXIS 998 at *5 (Dec. 21, 2001). But being harmed in that competition does not satisfy the test set out in *Western Union* and ICC precedent; that is, that the ability of the allegedly disfavored user of transportation services to compete with the allegedly favored shippers is harmed. Here, the only identification of allegedly favored shippers is in Exhibit 2, including Costco and Procter & Gamble, respectively a major discount chain and a major manufacturer. DHX does not compete with manufacturers or retailers; rather, it competes with CSX Lines and other ocean carriers to serve these shippers. The statutory Nebraska cause of action outlined in *Western Union* is not that Call Publishing was disadvantaged in competing against Western Union, but that it was disadvantaged in competing against another newspaper in Lincoln, Nebraska. Thus, even if *Western Union* did describe a federal common law cause of action, DHX has failed to plead a cause of action conforming to that test. Thus, its Complaint should be dismissed pursuant to Rule 12(b)(6).

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V. DHX'S COMPLAINT DOES NOT STATE A CLAIM FALLING WITHIN THE COURT'S ADMIRALTY JURISDICTION UNDER 28 U.S.C. § 1333

Plaintiff's central allegation against CSX Lines involves the alleged discriminatory treatment by CSX Lines, a common carrier, of another common carrier, DHX. DHX does not identify any specific contracts at issue in its complaint, nor does it allege breach of contract. The crux of Plaintiff's Complaint involves rather an alleged failure or refusal of CSX Lines to enter into volume rates or contracts with Plaintiff. Complaint, ¶¶ 31-35. That Plaintiff's Complaint sounds in tort rather than contract informs the Court's analysis of the presence or absence of admiralty jurisdiction in this case. "Admiralty tort jurisdiction is determined quite differently from admiralty contract jurisdiction." *Sirius Insurance Co. (UK) Ltd. v. Collins,* 16 F.3d 34, 37 (2d Cir. 1994).

The Supreme Court enunciated the current test for admiralty tort jurisdiction in 1972. *Executive Jet Aviation, Inc. v. City of Cleveland,* 409 U.S. 249, 93 S. Ct. 493, 34 L. Ed. 2d 454 (1972) (*"Executive Jet"*). The case arose from the crash of an aircraft into Lake Erie immediately following take-off. The plaintiffs invoked the admiralty jurisdiction of the federal court because the situs of the injury was on navigable waters. The Supreme Court denied that admiralty jurisdiction existed and created a two-part test for admiralty tort jurisdiction. The Court stated that in order to invoke admiralty jurisdiction

successfully, the injury must occur on navigable waters and the activity must have some connection to maritime commerce. *Id.* at 264. Without both elements, the activity was not substantially connected to traditional maritime activity as required to invoke admiralty jurisdiction.

The *Executive Jet* test is limited by its facts to injuries arising out of airplane crashes on navigable waters. However, in subsequent cases the Supreme Court expanded its two-part test to all maritime torts. *See Foremost Insurance Co. v. Richardson,* 457 U.S. 668, 102 S. Ct. 2654, 73 L. Ed. 2d 300 (1982). *See also Sisson v. Ruby,* 497 U.S. 358, 110 S. Ct. 2892, 111 L. Ed. 2d 292 (1990). The Ninth Circuit has adhered strictly to the standards set out in *Executive Jet* and its progeny. "In this Circuit, following *Executive Jet*, a claim falls within the federal court's admiralty jurisdiction if the actions complained of have (1) a maritime 'situs'-- a tort on or over navigable waters, and (2) a maritime 'nexus' -- a significant relationship to traditional maritime activity." *Guidry v. Durkin,* 834 F.2d 1465, 1469 (*"Guidry"*) (9th Cir. 1987) (citing *Solano v. Beilby,* 761 F.2d 1369, 1370 (9th Cir. 1985)).

The maritime "situs" portion of the test is easily defined and reflects that admiralty jurisdiction does not extend to torts committed on land.[29] The "situs" requirement is a bright-line jurisdictional rule. The Ninth Circuit has stressed,

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"[t]here is no doubt, however, that whether the injury occurred on navigable waters remains part of the inquiry in determining admiralty jurisdiction."[30]

The tort claim at issue here, price discrimination based on common law principles, does not fall within the Court's admiralty jurisdiction. The alleged tort did not occur on navigable waters and is not alleged to have been caused by a vessel on those waters. *See Jerome v. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, 115 S. Ct. 1043, 130 L. Ed. 2d 1024 (1995). Taking DHX's complaint on its face, CSX Lines' alleged misstep was a refusal to provide service contracts or volume rates to the plaintiff. This is a land-based act and is not, therefore, cognizable as a maritime tort. Where, as here, "it is clear that tortious injury occurs solely ashore, the federal courts are generally without admiralty jurisdiction."[31]

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[29] *See Victory Carriers, Inc. v. Law*, 404 U.S. 202, 92 S. Ct. 418, 30 L. Ed. 2d. 383 (1971). *See also Simon v. Intercontinental Transport (ICT) B.V.*, 882 F.2d 1435, 1440-1441 (9th Cir. 1989) (*"Simon v. Intercontinental"*).

[30] *See, e.g., J. Lauritzen A/S v. Dashwood Shipping Ltd.*, 65 F.3d 139, 142 (9th Cir. 1995) (*"J. Lauritzen A/S v. Dashwood"*); *Whitcombe v. Stevedoring Services of Am.*, 2 F.3d 312, 314, n.1 (9th Cir. 1993) (*"Whitcombe"*); *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 366 (9th Cir. 1992).

[31] *See Guidry* at 1469-1470. *See, e.g., Lamontage v. Craig*, 632 F. Supp. 706, 709 (N.D. Cal. 1986) (admiralty jurisdiction does not extend to defamatory libel where, although written at sea, publication and corresponding injury occurred on land), *aff'd per curiam* 817 F.2d 556 (9th Cir. 1987); *Clinton v. Joshua Hendy Corp.*, 285 F.2d 199, 201-202 (9th Cir. 1960) (*"Clinton v. Joshua Hendy"*) (admiralty jurisdiction not extended to tortious interference with contractual relations consummated on land); *Clinton v. International Org. of Masters*, 254 F.2d 370, 372 (9th Cir. 1958) (*"Clinton v. International Org. of Masters"*) (there is no allegation that the tort was committed upon navigable waters, therefore, no maritime tort sufficient to confer jurisdiction upon the admiralty court is alleged).

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Lastly, if an alleged tort occurs on land, the Court lacks admiralty jurisdiction even if the party seeking jurisdiction alleges that the subsequent injury occurred on navigable waters. In *J. Lauritzen A/S v. Dashwood*, the district court had determined that the tort in question, tortious interference with a vessel pooling agreement, had taken effect on land. *Id.* at 142-43. It therefore concluded that any subsequent injury that occurred on navigable waters was too remote to meet the locus requirement. *Id.* at 142. The Court of Appeals affirmed. In so holding the Court adopted the reasoning of the Fifth Circuit in *Kuehne & Nagel v. Geosource, Inc.*, 874 F.2d 283, 288-289 (5th Cir. 1989) (tort of fraudulent inducement occurred on land and any subsequent injury caused at sea to the cargo was too remote to the actual tortious conduct). *Id.* at 143. This Circuit has rejected the First Circuit's exception to this test stated in *Carroll v. Protection Maritime Ins. Co.*, 512 F.2d 4 (1st Cir. 1975), which held that the locality requirement would be satisfied if the impact of the tort was felt on navigable waters. In so holding, the Ninth Circuit stated that:

> The strong weight of the case law, however, persuades us that the traditional inquiry of locality continues to control. *See, e.g., Mink ex rel Insur. Co. of N. American v. Genmar Indus.*, 29 F.3d 1543, 1545 (11th Cir. 1994); *Whitcombe* at 314. We decline to broaden that inquiry in this circuit. *See Guidry* at 1469 (recognizing for defamation tort that no admiralty jurisdiction exists where tort occurred solely on land); *Clinton v. International Org. of Masters* (holding that tortious interference

with contract must occur on navigable waters to be cognizable in admiralty); *Clinton v. Joshua* Hendy..

Id. at 143.

DHX does not allege that any actions occurred on a vessel. Further, DHX has not alleged any subsequent injury that occurred on navigable waters. DHX, therefore, has not met the situs requirement for admiralty tort jurisdiction and therefore its assertion of admiralty jurisdiction must fail.[32]

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[32] It is not necessary, therefore, to engage in a lengthy discussion as to whether the alleged wrong had a sufficient relationship to traditional maritime activity for jurisdictional purposes. The wrongs asserted took place prior to the formation of the rates or contracts requested by DHX. Even if one assumes that a rate or service contract is a maritime transaction, a point that CSX Lines would dispute if it were squarely presented, admiralty generally denies jurisdiction over obligations or services that are merely preliminary to maritime contracts. *See Simon v. Intercontinental.. See also The Thames,* 10 F. 848 (S.D.N.Y. 1881) ("The distinction between preliminary services leading to a maritime contract and such contracts themselves has been affirmed in this country from the first."). In this instance, negotiations or the failure to enter into negotiations for a rate or service contract are preliminary services at best and do not implicate the admiralty jurisdiction of the district courts of the United States.

VI. CONCLUSION

For the foregoing reasons, the Court should dismiss DHX's Complaint.

Respectfully submitted,

FLYNN, DELICH & WISE

Dated: October 7, 2002 By: _____

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EXHIBIT A

original

U.S. DEPARTMENT OF TRANSPORTATION
SURFACE TRANSPORTATION BOARD

DHX, INC.,

Complainant,

v.

205280

STB Docket No. WCC-105

MATSON NAVIGATION COMPANY and SL SERVICE, INC., f/k/a SEA-LAND SERVICE, INC. and Now Trading As CSX LINES, LLC,

Defendants.

AMENDED COMPLAINT

Comes Now, DHX, Inc., Complainant herein, by and through its counsel, and submits this Amended Complaint pursuant to the Order of the Surface Transportation Board served March 28, 2002.

The original complaint in this proceeding was filed on October 1, 1999 and is, to the extent not inconsistent herewith, incorporated herein. The claims and averments contained herein have been submitted to this Board pursuant to the provisions of sections 13701(c), 13702(b)(6) and 14701(b), 49 United States Code, (2001 Supp.). Complainant hereby seeks damages in an amount to be determined by the Board, after due hearing, and for such other and further relief as the Board deems just and appropriate in the circumstances. Complainant hereby complains individually and further jointly as to these above named defendants as more fully set forth herein.

EXHIBIT A page 25

The Board, by Order served March 28, 2002, directed DHX to submit an amended complaint in which DHX "identified the grounds for action and the relief sought" (Order at page 3). The Board likewise noted that the gist of the DHX original complaint was that defendants were engaging in "unreasonable practices in order to put consolidators such as DHX out of business". Id. In response, DHX hereinafter states as follows:

The Market

The instant complaint involves the provision of transportation services between the United States mainland on the one hand, and on the other the State of Hawaii. The defendants provide a vessel operating ocean common carrier service between the major ports on the West Coast of the United States and Honlulu, Hawaii. These carriers have arrangements for transfer of cargo to "feeder" tug and barge operations for onward movement to the various islands (other than Oahu) that make up the State of Hawaii.

The Market is subject to service restrictions by way of limitation of ownership, operation, control, cargo capacity pursuant to the Jones Act and the Maritime Security Act of 1996. (46 App.U.S.C. §§883 and 46 App.U.S.C. §§1187 respectively). In addition, the ocean trade to and from Hawaii is further limited to service using ships built in the United States, operated/manned by crews from the United States, and operating under the United States flag. The named defendants do qualify under the above cited requirements.

EXHIBIT A Page 26

The Parties

1. Complainant, DHX, Inc. (hereinafter referred to as "DHX") conducts business as a freight forwarder in the United States domestic offshore trades further known as the "Noncontiguous Domestic Trade(s)" as defined in section 13102(15), 49 United States Code (2001 Supp.).

2. Complainant, DHX, Inc. further is registered and licensed as a motor common carrier pursuant to section 13902(a), 49 United States Code (2001 Supp.).

3. DHX maintains its principal place of business as 19201 Susana Road, Rancho Dominguez, California 90221.

4. DHX maintains terminal facilities at Rancho Dominguez as well as terminal facilities located in Oakland, California, Portland, Oregon, Seattle, Washington, Honolulu, Hawaii, and on the territory of Guam.

5. DHX further provides motor transportation from, to and between points and places in California, Oregon and Washington.

6. Defendant, Matson Navigation Company (hereinafter referred to as "Matson") conducts business as a vessel operating ocean common carrier between ports located in California, Oregon and Washington, on the one hand, and on the other ports in Hawaii and Guam.

7. Matson, at all times material to this complaint, was a carrier defined by section 13102(22), 49 United States Code (2001 Supp.).

8. Matson, at all times material to this complaint, was conducting business and operating as a water common carrier

EXHIBIT A Page 27

subject to the provisions of sections 13701 and 13702, 49 United States Code (2001 Supp.).

9. Matson, in furtherance of its operations as a water common carrier, maintains ocean marine terminals at Terminal Island, Los Angeles, CA., the Seventh Street Terminal, Oakland, CA., and Terminal No. 25, Seattle, WA.

10. Matson holds itself out to provide ocean common carrier services to and from the port of Portland, Oregon but does not make vessel calls at Portland.

11. Matson holds itself out to provide ocean common carrier services to and from the port of Tacoma, Washington but does not make vessel calls at Tacoma.

12. Matson, in furtherance of its operations as a water common carrier maintains an ocean terminal at Sand Island Terminal, Honolulu, Hawaii.

13. Matson provides its ocean common carrier transportation services between the United States mainland and Hawaii through the use of containerships.

14. Defendant, Sea-Land Service, Inc., on or about December 9, 1999 sold certain assets to A.P. Moller-Maersk Line which assets included ships and Sea-Land's foreign trade business.

15. On or about January 5, 2000, Sea-Land Service, Inc. filed with the Surface Transportation Board, 7th Revised Page 2,110,001 in which defendant represented that it was now operating under the name "CSX Lines, LLC". See Attachment "A" hereto.

EXHIBIT A Page 28

16. Defendant Sea-Land Service asset sale to Maersk included ocean terminal facilities at Long Beach, California and Tacoma, Washington.

17. Defendant, subsequent to the sale to Maersk of the terminals identified in paragraph 16 above, is now one of a number of users of the above mentioned ocean terminal facilities.

18. Defendant, Sea-Land Service, Inc., now known as CSX Lines, LLC, at all times material to this complaint, held itself out as a vessel operating ocean common carrier in the United States domestic offshore trades further known as the "Noncontiguous Domestic Trade(s)" as defined in section 13102(15), 49 United States Code (2001 Supp.).

19. Defendant, Sea-Land Service, Inc., now known as CSX Lines, LLC, conducts business as a vessel operating ocean common carrier between ports located in California, Oregon and Washington, on the one hand, and on the other ports in Hawaii and Guam.

20. Defendant, Sea-Land Service, Inc., now known as CSX Lines, LLC, at all times material to this complaint, was a carrier defined by section 13102(22), 49 United States Code (2001 Supp.).

21. Defendant, Sea-Land Service, Inc., now known as CSX Lines, LLC, holds itself out to provide ocean common carrier services to and from the port of Portland, Oregon but does not make vessel calls at Portland.

22. Defendant, Sea-Land Service, Inc., now known as CSX Lines, LLC, holds itself out to provide ocean common carrier services to and from the port of Seattle, Washington but does not make vessel calls at Seattle.

EXHIBIT A Page 29

23. DHX, at all times material to this complaint, was a customer of both defendants and tendered freight to both defendants for transportation between points and places in California, Oregon and Washington, on the one hand, and Hawaii and Guam on the other.

The Tariffs In Issue

24. Matson has published and filed with the Surface Transportation Board more than one tariff that contains rates and charges applicable on the services provided by Matson in the involved Noncontiguous Domestic Trade(s) between the mainland United States and both Hawaii and Guam.

25. Matson has published and filed with the Surface Transportation Board tariff STB MATS No. 34 (also identified as Matson "Tariff 14-F") which represents that Tariff 14-F contains Local Commodity Rates applicable on an all water service identified as a "CY to CY" or "Container Yard to Container Yard" service.

26. Matson Tariff 14-F contains rates and charges which reflect a "port-to-port" ocean transportation service and such Tariff 14-F was filed an in effect at all times material to this complaint.

27. Matson Tariff 14-F includes rates and charges for Matson's port-to-port services between the ocean terminals identified in paragraphs 9 and 12 of this complaint.

28. Matson has published and filed with the Surface Transportation Board tariff STB MATS 2016-D (also identified as Matson "Tariff 2106-D") which represented that Tariff 2016-D contained

EXHIBIT A Page 30

Joint Motor-Water Commodity Rates applicable from shipper "Store-door" locations in California, Oregon and Washington, on the one hand, and points in Hawaii on the other.

29. Matson Tariff 2016-D constructed the joint rates by use of or identification of a "base" rate that was equal to the all water port to port rates contained in Tariff 14-F.

30. Matson Tariff 2016-D provided that a shipper determine the applicable joint motor-water rate by reference to Rule 750 of that tariff which contained a "zone arbitrary" charge which was to be added to the identified base rates in order to determine the joint motor-water rates.

31. Matson Tariff 2016-D was published and in effect at all times material to this complaint.

32. Matson Tariff 14-F contained a "Section 7" which in turn contained a charge for "Wharfage" to be applied on and added to the port to port rates contained in Tariff 14-F.

33. Matson Tariff 2016-D contained a "Section 7" which in turn contained a charge for "Wharfage" to be applied on and added to the joint motor-water rates contained in Tariff 2016-D.

34. Matson Tariff 2016-D, Rule 750, contained a statement of rates and charges which reflected a motor carrier pickup and delivery service between inland locations and Matson's port terminal facilities for ocean transport to Hawaii.

35. The charges contained in Rule 750 of Matson Tariff 2016-D, at all times material to this complaint, did not increase nor decrease simultaneously with Matson's filing and publication of rate increases or decreases in Tariff 2016-D with the Surface Transportation Board.

EXHIBIT A Page 8

36. That Matson, at all times material to this complaint, did not negotiate the joint motor-water rates contained in Matson Tariff 2016-D with the motor carriers listed as participating in Tariff 2016-D.

37. Matson Tariff 2016-D represents Matson's unilateral representation that Tariff 2016-D contains jointly agreed upon rates but that the charges contained in Rule 750, at all times material to the complaint, were actually local motor carrier pickup and delivery charges that were established without any agreement between Matson and the motor carriers to which Tariff 2016-D ascribes as jointly agreed motor-water rates.

38. Matson has published and filed with the Surface Transportation Board tariff STB MATS 2034-E (also identified as Matson "Tariff 2034-E") which was in effect at all times material to this complaint.

39. Matson Tariff 2034-E represents that it contains rates and charges that are applicable between points in the mainland United States, on the one hand, and on the other, points in Hawaii.

40. Matson Tariff 2034-E represents that it contains joint rates and proportional rates applicable between points and ports in the mainland United States, on the one hand, and on the other points and ports in Hawaii.

EXHIBIT A Page 32

41. Matson Tariff 2034-E is divided into "sections" which include as follows:

Section 2 - Dry Cargo Commodity Rates-Motor-Water
Section 3 - Refrigerated Cargo Rates-Motor-Water
Section 4 - Motor Vehicles-Motor-Water
Section 5 - Joint Dry Cargo Proportional Commodity Rates--Motor-Water
Section 6 - Joint Refrigerated Cargo Proportional Commodity Rates-Motor-Water
Section 7 - Joint Motor Vehicle Proportional Rates-Motor-Water
Section 8 - Routes

42. The sections of Matson Tariff 2034-E existed as described in paragraph 41 above at all times material to this complaint.

43. Matson Tariff 2034-E also contained a "Section 1" which contained the Rules and Regulations applicable to Tariff 2034-E.

44. The application and geographical scope of Matson Tariff 2034-E is contained in Section 1, Rule 150 and Rule 750 of that tariff.

45. Matson Tariff 2034-E Rule 150 represents that the rates in Tariff 2034-E apply "westbound" "from shipper's premise at a named origin" to a Container Yard at a Hawaii Port, subject to Rule 750.

46. Matson Tariff Rule 750 of Tariff 2034-E states that when service under rates contained in Tariff 2034-E apply to or from "shipper's or consignee's premises" then such service "will apply at any location within the limits of the cities, town or villages from or to which the rate applies".

47. Matson Tariff 2034-E Rule 150 further states that the definitions of service in Rule 150 may be modified by

EXHIBIT A Page 33

specific provisions in a commodity rate item.

48. Matson Tariff 2034-E represents that it names proportional rates that apply, on a westbound basis, as follows:

> "From Container Yard at a Pacific Coast Port to Container Yard at a Hawaii Port".

This language, as contained in Tariff 2034-E Rule 150 was in effect at all times material to this complaint.

49. Matson Tariff 2034-E, sections 2, 3, contain joint motor water rates and contain a statement of the through routes over which the rates in those sections apply.

50. Matson Tariff 2034-E, section 5, does not contain any reference to nor state any through routes over which such rates as are contained in section 5 are to be applied.

51. Matson Tariff 2034-E, section 5, states that the rates contained in section 5 apply as follows:

> "Commodity Rates On Non-Refrigerated Cargo-Motor-Water
> Rates in dollars per container to Hawaii CY unless otherwise stated.
> Rates are proportional and apply only on shipments having a prior or subsequent movement by a motor carrier and apply from origin CY and to destination CY only"

Such application of rates contained in Matson Tariff 2034-E, section 5, was in effect at all times material to this complaint.

52. Matson Tariff 2034-E, at all times material to this complaint, did not contain a rule, provision, or "section" which included a charge for mainland wharfages nor Honolulu destination wharfage.

53. Matson, pursuant to the rates and charges in Matson Tariff 2034-E did not assess but Matson absorbed in its rates, all charges that would have been included in Sections 7 of Matson Tariff 14-F and Tariff 2016-D.

EXHIBIT A Page 34

54. Matson Tariff 14-F and Tariff 2016-D, at all times material to this complaint, contained a Governing Publication provision which stated that the tariff was subject to and governed by the Uniform Freight Classification tariff ICC UFC 6000-H.

55. Defendant, Sea-Land Service, Inc., now known as CSX Lines, LLC, published and filed with the Surface Transportation Board tariff STB SEAU 468 that was in effect from October 1, 1997 to June 13, 2001.

56. Defendant, Sea-Land Service, Inc., on June 14, 2001 did publish and cause to be filed with the Surface Transportation Board tariff STB CSXL 468. See Attachment "B" hereto.

57. Tariff STB CSXL 468 was published and filed in the name of "CSX Lines, LLC" but the tariff contained the same provisions, rules and rates as existed in Tariff STB SEAU 468 on June 13, 2001.

58. Defendant Sea-Land Service, Inc., upon complainant's best information and belief, caused the transfer of its business and operations from defendant Sea-Land Service, Inc. (also known as SL Service, Inc.) to a new and separate company now known as CSX Lines, LLC.

59. Complainant, upon best information and belief, states that the transfer of the business and operations stated in paragraph 58 above occurred between January 5, 2000 and June 13, 2001.

60. Complainant, upon best information and belief, states that CSX Lines, LLC is the successor in interest to Sea-Land Service, Inc. (also known as SL Service, Inc.).

EXHIBIT A Page 35

61. Tariff STB SEAU 468 represented that it contained rates and charges reflecting "Joint, All-Water and Proportional Commodity Rates" that applied on services between ports and points in the Mainland United States, Alaska, Puerto Rico, Canada and Mexico, on the one hand, and on the other ports and points in the State of Hawaii.

62. Tariff STB CSXL 468 represents that it contains rates and charges reflecting Joint through intermodal and all-water movements of container freight.

63. Rule 160 of STB CSXL 468 represents that defendant's all-water service applies between defendant's terminals that are identified in Rule 940 of STB CSXL 468.

64. Rule 940 of STB CSXL 468 consists of two parts--Rule 940-A and 940-B which were in effect from June 14, 2001 to the date of this amended complaint, and limit the application to those ports stated therein. See Attachment "C" hereto.

65. Rule 160 of STB CSXL 468 further represents that it contains "Storedoor" rates which are determined by identification of a "base" rate which is then added to a "Zone Arbitrary" to determine the "joint rate".

66. Defendant CSX Lines pricing structure in construction of such "joint rates" is the same as set forth by Matson in Matson Tariff 2016-D.

67. Defendant CSX Lines, LLC in both STB SEAU 468 and STB CSXL 468 maintains a separate charge section identified as "Wharfage" charges.

EXHIBIT A Page 36

68. Defendant's provisions contained in Rule 998, sub-parts 998(A) through 998(H) reflect the same level of rates and charges for Wharfage, except as to charges applicable on 24 foot size equipment by Matson, as those published by and applied by defendant Matson.

69. CSX Tariff 468, and its predecessor SEAU 468, contain commodity rates and charges based upon weight and measure and based upon "per container" or "PC" ratings.

70. Matson Tariff 2034-E contains a series of rate items that are specifically stated as applying on cargo of named shippers.

71. CSX Tariff 468, and its predecessor SEAU 468, contains and contained a series of rate items that contain restrictions on the rate items as applying to or from identified street address locations.

72. CSX Tariff 468, and its predecessor SEAU 468, does not contain, nor incorporate by reference, any participating carriers nor through routes identified as being applicable on the joint rates identified in the identified tariffs--SEAU 468 and CSXL 468.

73. That all times material to this complaint, neither Tariff SEAU 468 nor Tariff CSXL 468 contained a statement of through routes nor participating carriers for either the alleged joint rates nor proportional rates published in Tariff SEAU 468 and subsequently CSXL 468.

74. Defendant, Sea-Land Service, Inc., now known as CSX Lines, LLC, does not issue through bills of lading for shipments that are moved and rated under the Joint rates or Proportional rates

EXHIBIT A Page 37

stated as contained in Tariff SEAU 468 or Tariff CSXL 468.

75. Tariff SEAU 468, from October 1, 1997 through June 13, 2001 contained rate items identified as being applicable on the shipments of named shippers.

76. Matson, at all times material to this complaint, did not issue through bills of lading for shipments received by Matson and rated under the Proportional rates contained in Matson Tariff 2034-E.

77. Matson, at all times material to this complaint, did issue freight invoices that reflected a "CY to CY" service and not a through route service for shipments rated under the Proportional rates in Tariff 2034-E.

78. Matson, at all times material to this complaint, did not publish nor identify any through routing applicable on the shipments rated by Matson under the Proportional rates in Matson Tariff 2034-E.

79. Defendant, Sea-Land Service, Inc., now known as CSX Lines, LLC, at all times material to this complaint, issued freight invoices that stated defendant's services under the Proportional rates in Tariff SEAU 468 and CSXL 468 were "TT" meaning that the service involved was between defendant's terminals as identified in Rule 940 and contained in Attachment "C" hereto.

80. That, upon information and belief, defendant Sea-Land Service, Inc., now known as CSX Lines, LLC, published its tariff in a manner such that defendant's tariff would match the rates, charges, and represented services in the tariffs filed by Matson.

EXHIBIT A Page 38

The Statutory Structure

Complainant, DHX, Inc., hereby identifies the statutes and regulations that Defendants have violated and which are the subject of this complaint proceeding.

Defendants are carriers subject to regulation pursuant to the provisions of the ICC Termination Act of 1995 (ICCTA), 49 U.S.C. §§13101 et seq. (1996 Supp.). Defendants have violated sections 13701(a), 13702(a) and 13702(b) as well as sections 1312.2(a), 1312.2(b), 1312(3)(a), 1312.3(c), title 49 Code of Federal Regulations. Defendant Sea-Land Service, Inc., now known as CSX Lines, LLC has further violated section 1312.[redacted] and section 1312.14(b) in that defendant's tariff contains the representation that it provides for "joint rates" but that the tariff contains no identification of any participating carrier other than defendant nor any "through routes" as required for a joint rate.

In addition to the above, both defendants have published tariffs which attempt to utilize non-transportation factors as a basis of ratemaking and which result in a pattern of numerous duplicating and conflicting rates through out the involved tariffs.

Section 13701(a) requires that a regulated carrier's rates, classifications and practices be 'reasonable'. Section 13702(a) requires carriers to provide service only if the carriers rates and charges for the carrier's services are contained in a filed tariff. Section 13702(b) provides the

EXHIBIT A Page 59

minimum statutory requirements for the contents of a tariff. These minimum requirements include the identification of the carriers that are parties to the tariff (§§13702(b)(1)(A)), the privileges given and facilities allowed (§§13702(b)(1)(D)) and any rules that change, affect, or determine any part of the published rate (§§13702(b)(1)(E)).

Defendants have a duopoly in the subject market. They exercise a form of price leadership or conscious price parallelism through the public exchange of price information which results in the matching of rates and charges. These carriers further publish rates and charges on commodities that are not subject to regulation in order to maintain the exchange of such information. These carriers likewise publish the purported inland divisions of motor carrier portions of purported "through joint rates" which are not required to be public pursuant to 49 U.S.C. §§13702(b)(3). These carriers further publish the names and some of the information related to their services for "major" or large shipper accounts which is not required by the ICCTA. These carriers, however, appear to withhold or fail to publish all service terms and conditions which include the apparent existence of cargo volume commitments by these large customer accounts. The carriers decline to make volume pricing available to freight forwarders and the complainant in particular, based upon the representation that neither carrier participates in any form of volume pricing nor service contract arrangements in the subject domestic offshore trade.

EXHIBIT A Page 4 of 10

In addition to the above, these carriers have entered into a capacity rationalization agreement which has been implemented as a reciprocal "shipper-carrier" arrangement and is being conducted by the carriers in apparent violation of section 13702(b)-(1), 49 U.S.C. (1997 Supp.). The pattern of price parallelism and elimination of service competition represents a breakdown of competition in or a "market failure" in the Noncontiguous Domestic Trade to and from Hawaii.

The Board's Rules of Practice and Procedure permit the submission of claims against carriers individually and jointly. Complainant hereinafter sets forth its claims against each of defendants individually and thereafter those claims that may be made against defendants jointly.

(I)
COMPLAINANT'S CLAIMS AS TO DEFENDANT
MATSON NAVIGATION COMPANY

Count 1

81. Complainant hereby incorporates the averments contained in paragraphs 1 through 80 as if set forth in full.

82. Matson, in its tariffs 14-F and 2016-D, at all times material to this complaint, has published 'minimum revenue' rates in freight classification rules.

83. Matson, Rule 31(a)(2) of Tariff 14-F, and Rule 884(a) of Tariff 2016-D, impose upon shippers a minimum revenue charge on containers classified by the Rules as "Overflow" containers.

EXHIBIT A Page 44

84. The minimum revenue charges in Matson's Tariff 14-F and 2016-D are stated on a 'last container' basis and are applied on containerload freight rated under Rule 30 of Tariff 14-F and Rule 646 of Tariff 2016-D.

85. Rule 30 of Tariff 14-F and Rule 646 of Tariff 2016-D are Mixed Shipment provisions that are used by complainant to tender consolidated containers to Matson.

86. Rule 30 of Tariff 14-F and Rule 646 of Tariff 2016-D require that each commodity in a Mixed Shipment be rated at the applicable 'per hundred weight("CWT")' stated in the tariff for the identified commodities.

87. The publication of a minimum revenue per container rate, applicable upon rates stated and required to be applied on a CWT basis represents not only incompatible forms of rates, but represents an intent to deprive shippers of the ability to challenge the 'minimum revenue container charges' on reasonableness grounds as applied to Mixed Shipments.

88. The publication of a minimum container rate in a tariff rule, rather than in a rate item, does not comply with the requirement that tariffs be clear, simple and unambiguous as applied to Mixed Shipments.

89. The publication of a rate in a rule further represents a 'misplacement' with the intent to mislead the shipper as to the applicable rates and charges on any given individual commodity.

90. The publication of a minimum revenue "per container" or a containerload rate in a tariff rule constitutes an unreason-

EXHIBIT A Page 4 of 4

able practice and a violation of 49 CFR 1312.3(c)(1999 ed.).

91. Commodities shipped under a Mixed Shipment rule, and rated on a CWT basis, should be rated on a CWT basis and not on a 'partial' CWT and a 'Container' minimum revenue basis.

92. Complainant has been damaged by the application of the minimum revenue provisions in Tariff 14-F Rule 31 and Tariff 2016-D Rule 884 to the extent that Complainant's Overflow Container cargo has been made subject to a Containerload minimum revenue charge rather than being rated on a CWT basis for the actual amount of the cargo contained in the Overflow Shipment.

Count 2

93. Complainant hereby incorporates the averments contained in Paragraphs 1 through 92 as if set forth in full.

94. Matson, from at least October 1, 1997 through June 2, 2001, maintained Rule 31(a)(1) and Rule 31(a)(2) in tariff 14-F.

95. Rule 31 of Tariff 14-F is denominated as an "Overflow Cargo" rule but it represents a rule of freight classification.

96. Rule 31(a)(1) of Tariff 14-F provides that shippers that tender Overflow Cargo directly to Matson are assessed rates "based upon the total weight of the shipment".

97. Shippers that tender their Overflow Cargo to Matson under Rule 31(a)(1) are not subject to the minimum revenue charge in Rule 31(a)(2) but are charged only for the weight of the cargo actually shipped.

EXHIBIT A Page 43

98. The contents of Matson Tariff 14-F Rule 31 reflects that it is discriminatory on its face and in its application dependent upon the identity of the party 'loading' the container.

99. The provisions of Rule 31(a)(2) are applied as to freight forwarders that tender Overflow Cargo to Matson while proprietary shippers that tender Overflow Cargo are not subjected to the minimum revenue container charge.

100. The discriminatory application of a tariff rule, which is not based upon legitimate transportation factors, is an unreasonable and arbitrary practice and an unreasonable form of freight classification in violation of §§13701(a), 49 U.S.C.

101. Complainant has been damaged by the discriminatory application of Tariff Rule 14-F Rule 31(a)(2) as compared to Rule 31(a)(1) and such injury extends to the assessment and the collection of minimum revenue charges on Complainant's Overflow Cargoes as compared to the assessment and collection of Overflow Cargo charges based upon the actual weight of the cargo tendered as overflow cargo.

Count 3

102. Complainant hereby incorporates the averments contained in Paragraphs 1 through 101 as if set forth in full.

103. Matson Tariff 14-F is governed by the Uniform Freight Classification, ICC UFC 6000-H.

104. The Uniform Freight Classification contains Rule 24 which governs the rating of cargoes shipped in excess of a full load.

EXHIBIT A Page 44

105. Rule 24 (Section 2) of ICC UFC 6000-H states that cargoes in excess of a full load are to be rated "at actual" weight.

106. Rule 24 of ICC UFC 6000-H conflicts with Rule 31(a)(2) of Tariff 14-F and Rule 24 takes precedence as a 'governing' publication.

107. Matson is engaging in an unreasonable practice in maintaining conflicting rules of cargo and freight classification.

108. Complainant is entitled to the benefit of Rule 24 of ICC UFC 6000-H, and its successor publications, and has been damaged in the amount of the difference between the amounts Complainant has paid Matson as minimum revenue charges and the charges that would have been incurred has Complainant's Overflow Cargo been properly rated based upon the actual weight of the cargo shipped under Rule 31(a)(2).

Count 4

109. Complainant hereby incorporates the averments contained in Paragraphs 1 through 108 as if set forth in full.

110. Matson has represented to Complainant that Matson considers Complainant to be a competitor in so far as Complainant has solicited full truckload or containerload freight.

111. Matson, prior to June 1992, permitted Complainant to ship full containerload shipments by utilization of a Cargo, NOS provision contained in Matson Tariff 14-F, Item 5.

112. Matson, prior to June 1992, had complained to the Complainant that Item 5 of Matson Tariff 14-F was for the use of full containerload customers of Matson and that Complainant should not be using that tariff item.

EXHIBIT A Page 45

113. Matson, on June 18, 1992 filed Matson tariff ICC MATS 2034-E with the Interstate Commerce Commission which tariff had an effective date of July 1, 1992.

114. Matson tariff ICC MATS 2034-E was subsequently re-designated by Matson as tariff "STB MATS 2034-E" and is the same tariff as is complained of by DHX in this proceeding.

115. Matson, at the time of filing of ICC MATS 2034-E, did not disclose the existence of and the filing of that tariff to Complainant.

116. Matson, on July 12, 1992, did cancel and cause to be removed from Matson Tariff 14-F, Items 5 and 10 which provided rates on shipments tendered on a "Cargo NOS" and "Dangerous Cargo NOS" basis.

117. Matson, in tariff ICC MATS 2034-E, published rates that were then made available to proprietary shippers (also known as 'beneficial owners of cargo') on a joint motor-water rate basis.

118. Matson, at all times material to this complaint, has maintained joint motor-water rates as well as rates designated as "proportional rates" that are contained in STB MATS 2034-E which contain restrictions in their application to the non-transportation characteristic of "ownership" of the cargo.

119. Matson, at all times material to this complaint, has maintained joint motor-water rates as well as rates designated as "proportional rates" that are contained in STB MATS 2034-E that contain other restrictions in their application to

EXHIBIT A Page 46

identified zip codes, street address locations, named shippers, particular through routes, and minimum numbers of containers that may be tendered in a given period as well as a 'maximum' number of containers that may be tendered in a stated period of time.

120. Matson, at all times material to this complaint, has maintained joint motor-water rates as well as rates designated as "proportional rates" that are contained in STB MATS 2034-E that are made effective for periods of time that include a few days to as much as 60 to 90 days.

121. Matson, at all times material to this complaint, has maintained joint motor-water rates as well as rates designated as "proportional rates" that are contained in STB MATS 2034-E that are the same as "project rates" and which are limited in their application to identified consignees or locations in Hawaii.

122. Matson, from June 1992 through at least September 1993, did not list tariff ICC MATS 2034-E as being in existence and the fact of the filing and rates in ICC MATS 2034-E was denied as to Complainant.

123. Matson, at all times material to this complaint, has consistently refused to offer and to provide Complainant the same access to the joint motor-water services and level of rates that Matson provides to proprietary shippers and those shippers or consignees that have an "ownership interest" in the cargoes shipped and rated under STB MATS 2034-E.

EXHIBIT A Page 27

124. Matson, from and after June 1992 and at all times material to this complaint, represented to DHX that the rates and charges that were available to freight forwarders were those published in Matson Tariff 14-F or Tariff 2016-D.

125. Matson, at all times material to this complaint, represented that Complainant would have the ability to ship cargo on Matson's vessels utilizing the provisions of the Mixed Shipment Rule 30 and Overflow Container Rule 31 of Tariff 14-F.

126. Complainant, as a direct result of Matson's refusal to offer and provide DHX the same joint motor-water rates and proportional rates as Matson was providing to shippers or consignees that had ownership interests in the cargo, was obligated to utilize Matson's Mixed Shipment and Overflow Container provisions of Rules 30 and 31 of Tariff 14-F and Tariff 2016-D.

127. Matson only afforded access to the joint motor-water rates and proportional rates that Matson provided to shippers or consignees that had a beneficial ownership interest in the cargo when Complainant was acting as the warehouseman and drayage agent of such a proprietary shipper.

128. Matson, by way of publication of non-transportation restrictions contained in the various tariff items in STB MATS 2034-E, has established and maintains a rate structure which results in unreasonable discrimination against freight forwarders and further works to exclude freight forwarders from competing for full containerload business limiting forwarders to the use

EXHIBIT A Page 48

rates and charges in Matson's tariffs which resulted in overall higher rates, charges and costs of transportation than the rates charges and costs of transportation incurred by proprietary shippers for the same services offered by Matson to those shippers by way of Tariff 2034-E.

129. Complainant, as a direct and proximate result of Matson's unreasonable practices in maintaining unreasonable, unjust and discriminatory tariffs and rate structure, has been damaged through the loss of Complainant's full containerload customers and business.

130. Complainant, as a direct and proximate result of Matson's unreasonable practices in maintaining such discriminatory tariffs and the practice of excluding freight forwarders from the services and rates contained in Tariff 2034-E, has been damaged through the payment of rates and charges greater than those otherwise applicable under the the provisions of Tariff 2034-E.

Count 5

131. Complainant hereby incorporates the averments contained in Paragraphs 1 through 130 as if set forth in full.

132. Matson, between the period September 6, 1998 and October 17, 1999, undertook a restructuring of the provisions of Matson Tariff 14-F.

133. Matson, during the time period stated in Paragraph 132, did amend, revise or removed the tariff rules, items, item notes, or provisions that Matson had previously provided to freight forwarders under which forwarders, including Complainant, had been afforded the ability to ship full containerloads of

EXHIBIT A Page 41

freight at rates that were competitive with Matson's published full containerload rates.

134. Matson, in Rule 30 of Tariff 14-F, published what Matson identified as "Rule 30(c)(4) freight" rates.

135. Matson published rates in Rule 30 of Tariff 14-F in order to avoid the publication of individual rate items on the commodities listed in Rule 30(c)(4).

136. Matson, also published in Rules 30 and 31 of Tariff 14-F a definition of "shipment" that was not consistent with that term as customarily understood in the transportation industry.

137. Matson, did publish a definition of the term "shipment" in its Tariff 2034-E which was consistent with the use of that term as customarily understood in the transportation industry.

138. Matson did utilize the term "shipment" as contained in Rules 30 and 31 of Tariff 14-F as a means of creating or making "overflow" shipments as such could then be rated under Rule 31.

139. Matson, through a series of changes in Rule 30 and Rule 31, did revise the term "shipment" from applying to all containers tendered to Matson over a "14 day" period to a "7 day" period to those tendered on a single "vessel/voyage".

140. The effect of the changes of the term "shipment" was to reduce the total number of containers which could then be considered as and rated as "overflow" containers.

141. Matson, in conjunction with the restriction of the term shipment, likewise published increases in "minimum revenue" charges per container as contained in Rule 31.

EXHIBIT Page 50

142. Matson published three increases in the minimum revenue per container charge which totalled 17.5% which such increases were only incurred by freight forwarders, including Complainant that were required by Matson's rate structures to use Rules 30 and 31 of Tariff 14-F in order to ship multiple containers.

143. Matson, on November 18, 1998, removed and cancelled the rates provided on "Rule 30(c)(4) freight" and thereafter did publish individual rate items on commodities previously included in the Rule 30(c)(4) freight list. Attached hereto and identified as Attachment "D" is a copy of the Rule 30(c)(4) list.

144. Matson, in addition to the changes made in Rules 30 and 31 of Tariff 14-F, further amended "notes" contained in various heavy density or heavy loading commodity rates which resulted in the reduction of and elimination of freight forwarder use of those heavy density commodity rate items for top loading of light density cargoes.

145. Matson, between September 6, 1998 and November 18, 1998, did amend "notes" contained in the below list of commodity rates items in Tariff 14-F:

Item 115 - Canned or Preserved Foodstuffs
Item 185 - Drugs or Medicines
Item 270 - Paint, Materials and Other Articles
Item 305 - Paper and Printing Paper
Item 335 - Petroleum Products
Item 355 - Plasterboard, Gypsum Wallboard, Insulating
Item 500 - Washing, Cleaning or Laundry Compounds

146. Matson, in some of the above Items identified in Paragraph 145, did further include specific minimum weights which also precluded the use of such tariff items for top loading of light density cargoes.

EXHIBIT A Page 51

147. Matson, as stated in paragraph 142, imposed increases in the minimum revenue charges contained in Rule 31 which increases are described in the affidavit of Mr. Bradley J. Dechter dated September 30, 1999 and incorporated herein.

148. Matson, on February 14, 1999, imposed a 5% general rate increase applicable on per hundred weight (CWT) commodities contained in Tariff 14-F and Tariff 2016-D.

149. Matson, on February 14, 1999, did not impose the 5% general rate increase on shippers of full containerload freight that was rated by Matson pursuant to the provisions of Tariff 2034-E.

150. That the aforementioned actions of Matson, as stated in Paragraphs 131 through 149 herein, were directed at and only impacted the business of freight forwarders.

151. That as a direct and proximate result of the actions of Matson, as stated in Paragraphs 131 through 150 herein, Complainant was subjected to unreasonable, unfair and destructive competitive practices by Matson.

152. That as a direct and proximate result of the actions of Matson, as stated in Paragraphs 131 through 151 herein, Complainant was excluded from competition for full containerload business and competition in the Hawaii Trade.

153. That Matson, through the above identified unreasonable, unfair and destructive competitive practices has obtained an exclusion of freight forwarders from the market for full containerload business in the Hawaii Trade.

154. Complainant, as a direct and proximate result of the unreasonable, unfair and destructive practices of Matson, has been damaged by the loss of its containerload business and customers.

EXHIBIT A Page 52

Count 6

155. Complainant hereby incorporates the averments contained in Paragraphs 1 through 153 as if set forth in full.

156. Complainant, as a shipper under tariffs 14-F and 2016-D is obligated to and is assessed a charge for "Wharfage".

157. Matson, through the use of tariff 2034-E, does not assess but instead absorbs the wharfage charges which are imposed on shippers pursuant to Sections 7 of Tariffs 14-F and 2016-D.

158. The imposition or absorption of such Wharfage charges is based upon the identity of the shipper and thereby constitutes an unreasonable practice in imposition or absorption of such charges.

159. Complainant has been assessed and has paid charges for Wharfage as imposed by Matson and Complainant has been damaged thereby.

160. Complainant has been damaged by Matson's unreasonable and discriminatory practice of unequal absorption of wharfage charges in the amount that Complainant has paid Matson for such charges.

Count 7

161. Complainant hereby incorporates the averments contained in Paragraphs 1 through 160 as if set forth in full.

162. Matson has published rate items in Tariff 2034-E that reflect a port to port service but are limited to cargo having been shipped by the 'beneficial owner' or also termed "proprietary ownership" cargoes.

EXHIBIT Page 55

163. Matson has further published rate items in Tariff 2034-E which are contained in Section 5 and using item numbers 6000 through 6999 series and are identified as "proportional rates".

164. The rates in Tariff 2034-E, Section 5, items numbers 6000 through 6999 series do not contain a through route and are therefor local rates.

165. The rates in Tariff 2034-E, Section 5, item numbers 6000 through 6999 series involve only a port to port (CY to CY) service and, upon information and belief, duplicative of the port to port (CY to CY) rates and commodities contained in Matson Tariffs 14-F and 2016-D.

166. That the rates in Tariff 2034-E, Section 5, item numbers 6000 through 6999 series require a prior or subsequent movement by a motor carrier.

167. Complainant, as stated in Paragraph 2 herein, performed the transportation by motor vehicle as required by the Section 5 rates on the containers tendered to Matson by Complainant.

168. Complainant has been subjected to overcharges by reason of being assessed and paying the port to port rates and charges in Tariff 14-F and Tariff 2016-D rather than the rates and charges contained in Section 5 of Tariff 2034-E.

169. That the shipments tendered to Matson by Complainant should have been rated according to the rates contained in items: 6029, 6218, 6948, 6948-A, 6950-A, 6953, 6953-A, 6991, 6992 or such other rates items as were in effect at all times material to this complaint and applicable to the commodities involved.

EXHIBIT A page 54

Count 8

170. Complainant hereby incorporates the averments contained in Paragraphs 1 through 169 as if set forth in full.

171. Matson, in Tariff 2034-E, has published rate items which are restricted by means of named shippers, street addresses and zip codes.

172. The item restrictions are not related to and are not transportation factors in regard to Matson's CY to CY services.

173. The publication of non-transportation factors by a carrier with the intent of establishing an exclusive and discriminatory rate is an unreasonable practice.

174. The Noncontiguous Domestic Offshore Trade to and from Hawaii does not contain a sufficient number of carriers to be considered a 'competitive' market.

175. Matson has market dominance and controls approximately seventy (70) percent of the market.

176. Tariff items which effect to further reduce or eliminate competition and restrict such service to "beneficial" shippers is not consistent with the National Transportation Policy and a violation of section 13701(a).

177. Complainant, by reason of Matson unreasonable exclusionary provisions in Tariff 2034-E, has been denied access to rates necessary to make and sustain Complainant as a competitive alternative to Matson in the Hawaii trade.

178. Complainant has been damaged by the loss of Complainant's full containerload business and further by the exactation of

EXHIBIT A Page 35

rates and charges greater than what Matson should have assessed Complainant under the otherwise applicable tariff items in Tariff 2034-E.

Count 9

179. Complainant hereby incorporates the averments contained in Paragraphs 1 through 178 as if set forth in full.

180. Matson publishs rate items in Tariff 2034-E which, upon information and belief, appear to be part of a volume pricing arrangement between Matson and the named shippers. Attached hereto and identified as Attachment "E" is an example of such named shipper tariff rate item.

181. Complainant, at all times material to this complaint, has requested that Matson make available to Complainant rates based upon volume of cargo shipped, including long term arrangements for shipping Complainant's freight in the Hawaii trade.

182. Matson has represented to Complainant that the Hawaii trade is a "tariff trade".

183. Matson has represented to Complainant that Matson does not offer, provide nor participate in any form of volume pricing arrangements, including time volume rates, loyalty contracts or other service contracts.

184. Matson, upon information and belief, does offer and provide volume pricing to shippers in the Hawaii trade.

185. Matson has published and included Item 2979 in Tariff 2034-E which reflects reduced rates for the tender of a minimum of 20 containers per week. See Attachment "F" hereto.

186. Matson has engaged in a pattern of mis-representation to Complainant regarding the services, rates and prices that Matson provides and offers in the Hawaii trade.

187. Complainant, upon information and belief, includes herewith and identified as Attachment "G" a list of shippers for which Matson has published special rate items.

188. Complainant, upon information and belief, states that such tariff items as are reflective of those named shippers involved terms and conditions of service not contained in the published rates items.

189. Complainant, upon information and belief, states that Matson did not publish all such service terms and conditions for these named shipper so that Matson could maintain that it does not provide nor offer any form of volume pricing or rate incentives in the Hawaii trade.

190. Complainant, by reason of Matson's misrepresentations and failure to publically disclose all terms and conditions of service, states that Matson has violated 13701(a) and 13702(b)-(1), 49 U.S.C. and Complainant has been damaged thereby.

191. Complainant, by reason of Matson's unreasonable practices of mis-representation and operation under unpublished rates has lost its full containerload business, including lost profits from that business.

EXHIBIT A Page 07

(II)
COMPLAINANT'S CLAIMS AS TO DEFENDANT
SEA-LAND SERVICE, INC. NOW KNOWN AS CSX LINES, LLC

Count 1

192. Complainant hereby incorporates the averments contained in Paragraphs 1 through 80 as if set forth in full.

193. Defendant, hereinafter referred to as "Sea-Land/CSX", in its tariff STB SEAU 468, at all times material to this complaint and up to June 13, 2001 published 'minimum revenue' rates in freight classification rules.

194. Sea-Land/CSX, Rule 882 of STB SEAU 468 imposes upon shippers a minimum revenue charge on containers classified by the Rules as "Overflow" containers.

195. Sea-Land/CSX on June 14, 2001 published STB CSXL 468 and in that tariff, Rule 882 was the same as Rule 882 in STB SEAU 468 and which continued the minimum revenue charge on "Overflow" containers.

196. The minimum revenue charges in Sea-Land/CSX's Rules 882 are stated on a 'last container' basis and are applied on containerload freight rated under Rule 645 of tariffs STB SEAU 468 and STB CSXL 468 as "Mixed Shipments".

197. Rule 645 of STB SEAU 468 and STB CSXL 468 require that each commodity in a Mixed Shipment be rated at the applicable 'per hundred weight(CWT)' stated in the tariff items in STB SEAU 468 and STB CSXL 468 for the identified commodities.

198. Rule 645 of STB SEAU 468 and STB CSXL 468 provides a conversion calculation from per container rates to per CWT

EXHIBIT A Page 158

or CFT for articles rated per container.

199. Sea-Land/CSX, at all times material to this complaint, published and filed revisions to Rule 882 which resulted in the minimum revenue on Overflow containers being the same as or equal to Matson's minimum revenue charges in STB MATS 14-F Rule 31 and STB MATS 2016-D, Rule 884.

200. The publication of a minimum revenue charge per container rate, applicable upon rates stated and required to be applied on a CWT basis represents not only incompatible forms of rates, but represents an intent to deprive shippers of the ability to challenge the 'minimum revenue container charges' on reasonableness grounds as applied to Mixed Shipments.

201. The publication of a minimum container rate in a tariff rule, rather than in a rate item, does not comply with the requirement that tariffs be clear, simple and unambiguous as applied to Mixed Shipments.

202. The publication of a rate in a rule further represents a 'misplacement' with the intent to mislead the shipper as to the applicable rates and charges on any given individual commodity.

203. The publication of a minimum revenue "per container" or a containerload rate in a tariff rule constitutes an unreasonable practice and a violation of 49 CFR 1312.3(c)(1999 ed.).

204. Commodities shipped under a Mixed Shipment rule, and rated on a CWT basis, should be rated on a CWT basis and not on a 'partial' CWT and a 'container' minimum revenue basis.

EXHIBIT A Page 59

205. Complainant has been damaged by the application of the minimum revenue provisions of tariffs STB SEAU 468 and STB CSXL 468, Rules 882, to the extent that Complainant's overflow container cargo has been made subject to a container-load minimum revenue charge rather than being rated on a CWT basis for the actual amount of the cargo contained in the Overflow Shipment.

Count 2

206. Complainant hereby incorporates the averments contained in Paragraphs 1 through 80 and 192 through 205 as if set forth in full.

207. Sea-Land/CSX tariffs STB SEAU 468 and STB CSXL 468 are subject to and governed by the National Motor Freight Classification STB NMF 100-V and reissues thereof.

208. The National Motor Freight Classification contains Item 640, Sections 1 and 3 which require mixed shipments be rated and charged for "at the actual weights of the separate articles".

209. Item 640, Sections 1 and 3 were applicable to Sea-Land/CSX tariffs STB SEAU 468 and STB CSXL 468 at all times material to this complaint.

210. Item 640, Sections 1 and 3 conflict with Rules 882 in tariffs STB SEAU 468 and STB CSXL 468 and Item 640, Sections 1 and 3 take precedent over and Complainant is entitled to the benefit of Item 640, Sections 1 and 3.

211. Sea-Land/CSX is engaging in an unreasonable practice in maintaining conflicting rules of cargo and freight classification and mixed shipment provisions.

EXHIBIT A Page 62

212. Complainant has been damaged in the amount of the difference between the amounts Complainant paid Sea-Land/CSX as minimum revenue charges and the charges that would have been incurred had Complainant's overflow cargo been properly rated based upon the actual weight of the cargo shipped.

Count 3

213. Complainant hereby incorporates the averments contained in Paragraphs 1 through 80 and 192 through 212 as if set forth in full.

214. Sea-Land/CSX has published rate items in tariffs STB SEAU 468 and STB CSXL 468 that, at all times material to this complaint, contained restrictions on the access to and the applicability of the tariff items.

215. Sea-Land/CSX has published rate items that are restricted by the use of non-transportation factors including the identities or names of shippers and limitations to street addresses or zip codes.

216. The use of non-transportation factors as a basis of rate making and tariff application is an unreasonable practice and a violation of section 13701(a), 49 U.S.C.

217. Sea-Land/CSX has used such tariff item restrictions to preclude the use of and access to the rates in those items by Complainant.

218. Complainant, as a direct and proximate result of such actions by Sea-Land/CSX and the publication of such tariff item restrictions has been damaged in that Complainant has been required to ship cargoes with Sea-Land/CSX using the

EXHIBIT A Page 61

higher cost rate items to which Sea-Land/CSX would provide Complainant access.

219. Sea-Land/CSX, by way of publication of non-transportation restrictions contained in various tariff items in tariffs STB SEAU 468 and STB CSXL 468 has established and maintains a rate structure which results in unreasonable discrimination against Complainant and freight forwarders in general and further works to exclude freight forwarders from competing for full containerload business.

220. Complainant, in addition to incurring increased costs of transportation on defendant's vessels, has also been damaged as a direct and proximate result of Sea-Land/CSX's unreasonable practices in maintaining such discriminatory tariffs through the loss of Complainant's full containerload customers and business.

Count 4

221. Complainant hereby incorporated the averments contained in Paragraphs 1 through 80 and 192 through 220 as if set forth in full.

222. Sea-Land/CSX have published STB SEAU 468 and STB CSXL 468 containing "Section 4" which contains defendant's rates.

223. Section 4 of STB SEAU 468 and STB CSXL 468, at all times material to this complaint, purported to contain all-water rates (subsection 0200 series rates), proportional rates (subsection 0500 series rates), and storedoor joint motor-water rates (subsection 0600 series rates).

EXHIBIT Page 62

224. The service provided by Sea-Land/CSX pursuant to the series 0200 rates and series 0500 rates is the same and is a "Container Yard" to "Container Yard" service.

225. The rates reflected in the series 0200 and series 0500 are duplicative and conflicting on the same or similar commodities.

226. Complainant is entitled to the benefit of the lowest available rates contained in the series 0200 and series 0500 tariff items.

227. Complainant has been charged and has paid rates reflecting the higher of the involved rates.

228. Complainant has been damaged and has paid overcharges to the extent that Complainant has paid rates and charges that exceed those rates contained in Attachment "H" hereto.

Count 5

229. Complainant hereby incorporates the averments contained in Paragraphs 1 through 80 and 192 through 228 as if set forth in full.

230. Sea-Land/CSX's tariffs STB SEAU 468 and STB CSXL 468 contain three sets of rates applicable on the same service.

231. Sea-Land/CSX has published port to port rates in Section 4, series 0200 rate items.

232. Sea-Land/CSX has published port to port rates with a pickup and delivery service and denominated such rates as "Joint Rates" under Section 4, series 0600 rate items and through the provisions of Rules 160.A(2) of the cited tariffs.

EXHIBIT A Page 63

233. The rate items contained in Section 4, series 0500 and series 0600, are mislabeled and misrepresented in that such rate items contain no participating motor carriers nor do such rate items contain any through routings.

234. Sea-Land/CSX is in violation of sections 1312.14(a) and 1312.14(b) as well as section 13702(b)(1), 13701(b)(1)(A), 13701(b)(1)(D) and 13701(b)(1)(E), 49 U.S.C..

235. Sea-Land/CSX has also violated the provisions of 1312. 3(c), 49 CFR which requires clarity in tariffs and does not permit the mislabelling of tariff rates.

236. Complainant, as a direct and proximate result of Sea-Land/CSX's violation of the cited statutes and regulations has been subjected to duplicative and conflicting rate structure that have resulted in Complainant's payment of overcharges in amounts yet to be determined.

Count 6

237. Complainant hereby incorporates the averments contained in Paragraphs 1 through 80 and 192 through 236 as if set forth in full.

238. Sea-Land/CSX publishs rate items in tariffs STB SEAU 468 and STB CSXL 468, which upon information and belief, appear to be part of a volume pricing arrangement between defendant and the named shippers. Attached hereto and identified as Attachment "I" is an example of such named shipper tariff rate items.

239. Complainant, at all times material to this complaint, has requested Sea-Land/CSX to make available to Complainant rates based upon volume of cargo shipped, including long term

EXHIBIT A Page 44.

arrangements for shipping Complainant's freight in the Hawaii trade.

240. Sea-Land/CSX has represented to Complainant that the Hawaii trade is a "tariff trade".

241. Sea-Land/CSX has represented to Complainant that Sea-Land/CSX does not offer, provide nor participate in any form of volume pricing arrangements, including time volume rates, loyalty contracts or other service contracts.

242. Sea-Land/CSX, upon information and belief, does offer and provide volume pricing to shippers in the Hawaii trade.

243. Sea-Land/CSX has published and included Items 0620-80-1000 and 0299-01-0000 in tariff STB SEAU 468 which reflect rates dependent upon the tender of a minimum volume of 30 containers per week and five containers to a given city in Hawaii. See Attachment "J" as attached hereto.

244. Sea-Land/CSX has engaged in a pattern of mis-representation to Complainant regarding the services, rates and prices that Sea-Land/CSX provides and offers in the Hawaii trade.

245. Complainant, upon information and belief, includes herewith and identified as Attachment "K" a list of shippers for which defendant has published special rate items.

246. Complainant, upon information and belief, states that such tariff items as are reflective of those named shippers involved terms and conditions of service not contained in the published rate items.

EXHIBIT A Page 65

247. Complainant, upon information and belief, states that Sea-Land/CSX did not publish all such service terms and conditions for these named shippers so that Sea-Land/CSX could maintain that it does not provide nor offer any form of volume pricing or rate incentives in the Hawaii trade.

248. Complainant, by reason of Sea-Land/CSX's mis-representations and failure to publically disclose all terms and conditions of service, states that Sea-Land/CSX has violated 13701(a) and 13702(b)(1), 49 U.S.C., and Complainant has been damaged thereby.

249. Complainant, by reason of Sea-Land/CSX's unreasonable practices of mis-representation and operation under unpublished rates has lost its full containerload business, including lost profits from that business.

(III)

COMPLAINANT'S CLAIM AS TO BOTH DEFENDANTS

Complainant hereby states this claim as to both Matson Navigation Company and Sea-Land Service, Inc., now known as CSX Lines, LLC.

250. Complainant hereby incorporates the averments contained in Paragraphs 1 through 80 as if set forth in full.

251. Matson and Sea-Land/CSX provide the only fast ship service between the mainland United States and Honolulu, Hawaii.

251. Matson and Sea-Land/CSX, at all times material to this complaint, published and maintained rate and price structures that were matching in rates and services offered.

EXHIBIT A Page 16

252. The services of freight forwarders between the mainland United States and Hawaii on full containerload cargoes represent the only other sourse of service and price competition to the defendants in the Hawaii Trade.

253. Defendants have mis-represented to Complainant that the defendants do not offer, provide nor engage in volume pricing in the Hawaii Trade.

254. Defendants do in fact offer and provide volume pricing to include rates based upon the volumes of cargo tendered over identificasble period of time in the Hawaii Trade.

255. Defendants utilize the tariff filing and publication process as a device to communicate prices one to the other in the Hawaii Trade.

256. Defendants do not engage in rate, service or price competition in regard to full containerload cargoes shipped by freight forwarders in the Hawaii Trade.

257. Defendants has established a reciprocal service agreement, involving unfiled or published rates, which permits each carrier to tender full containerloads of cargo to the other carrier for ocean transport from the mainland United States to Hawaii.

258. Defendants have a "shipper-carrier" relationship under the reciprocal service agreement which agreement has been in effect at all times material to this complaint.

259. Defendants utilize such reciprocal service agreement as a device to reduce vessel capacities and reduce "service competition" as an element of the market for the transportation

EXHIBIT A Page 62

services in the Hawaii Trade.

260. That as a direct and proximate result of defendants' practice of matching prices, publication of rates and charges which are not required to be published, reciprocal services agreement, and refusal to offer volume pricing, time volume rates or other service agreements to freight forwarders, including Complainant, there has been a failure of market competition in the Noncontiguous Domestic Offshore Trade between the mainland United States and Hawaii.

261. That as a direct and proximate result of defendants' actions Complainant is denied the benefit of a competitive market in which to obtain ocean transportation rates and services in the Hawaii Trade.

262. That as a direct and proximate result of defendants' individual actions and their reciprocal service agreement, Complainant has been obligated to pay unjust, discriminatory and unreasonable rates and charges in violation of Section 13701(a), 49 U.S.C. (1999 ed.)

263. That the rates, charges and services which defendants provide to each other constitute a reasonable rate on the same commodities as are shipped by Complainant with both defendants.

264. That the rates, charges and services which defendants provide to named shippers further identified as "beneficial owners" of "proprietary owners of cargo" represent an alternate measure of what constitutes a just and reasonable rate and charge for defendants' services in the Hawaii Trade.

EXHIBIT A Page 68

265. That Complainant, as a direct and proximate result of defendants' violations of Sections 13701(a) and 13702(b)(1), 49 U.S.C., has been damaged in the amount to which defendants have assessed and collected monies from Complainant which exceed the rate or rates that defendants have set and agreed to charge one another for the ocean transportation of the same or similar commodities between the mainland United States and the port of Honolulu, Hawaii.

266. That Complainant, as a direct and proximate result of defendants' violations of Section 13701(a), 49 U.S.C., has been damaged in the amount to which defendants have assessed and collected monies from Complaiantn which exceed the rates and charges that defendants have assessed and collected from the shippers for which defendants have published or otherwise established named shipper tariff rate items or have otherwsie published tariff rate items that are restricted to the use of a particular shipper or receiver.

Prayer For Relief

Complainant hereby requests that the Board enter an Order awarding Complainant damages as against Matson Navigation Company in the amounts found by the Board to be appropriate and that such an Order include as follows:

Counts 1,2,3 . - The amounts paid by DHX which exceed the amounts that would have been due and owing based upon the actual weight of the commodities in Overflow containers;

EXHIBIT A page 69

Counts 4, 5 - The amount which the Board finds to be the value of Complainant's full containerload business, including lost profits from October 1, 1997 to the date of this Amended Complaint;

Count 6 - The amount which Complainant was assessed, collected from and paid by Complainant for Wharfage Charges from October 1, 1997 to the date of this Amended Complaint;

Count 7 - The amount which Complainant was assessed, collected from and paid by Complainant pursuant to the rates contained in Tariff 14-F and 2016-D exceeded the rates and charges on the same items and service that were contained in Tariff 2034-E, including pre-judgment interest from October 1, 1997 to the date of this Amended Complaint;

Counts 8, 9 - The amount which the Board finds to be the value of Complainant's full containerload business, including lost profits from October 1, 1997 to the date of this Amended Complaint; and

For such other and further relief as the Board deems just and appropriate in the circumstances.

Complainant hereby requests taht the Board enter an Order awarding Complainant damages as against Sea-Land Service, Inc., now known as CSX Lines, LLC in amounts found by the Board to be appropriate and taht such an Order include as follows:

EXHIBIT

Counts 1, 2 - The amounts paid by DHX which exceed the amounts that would have been due and owing based upon the actual weight of the commodities in Overflow containers;

Count 3 - The amount which the Board finds to be the value of Complainant's full containerload business, including lost profits from October 1, 1997 to the date of this Amended Complaint;

Count 4 - The amount which Complainant was assessed, collected from and paid by Complainant pursuant to the rates and charges in section 4, series 0200 rates which exceeds the rates stated in the series 0500 rates as contained in STB SEAU 468 and STB CSXL 468 on shipments made by Complainant from October 1, 1997 to the date of this Amended Complaint;

Count 5 - The amount which Complainant was assessed, collected from and paid by Complainant which exceed the lowest published and applicable rates and charges in STB SEAU 468 and STB CSXL 468, inlcuding pre-judgment interest, from October 1, 1997 to the date of this Amended Complaint; and

Count 6 - The amount which the Board finds to be the value of Complainant's full containerload business, including lost profits from October 1, 1997 to the date of this Amended Complaint;

EXHIBIT

Complainant hereby prays that the Board enter an Order against both defendants, jointly and severally, which awards to Complainant the amount which Complainant has paid to each defendant for shipments tendered to defendants which rates and charges exceed the rates and charges mutually agreed between defendants and contained in defendants' Reciprocal Service Agreement; and for such other and further relief as the Board finds just and reasonable in the circumstances.

Dated - 29 April 2002

Respectfully submitted,

RICK A. RUDE, Esq.
Suite 103
207 Park Avenue
Falls Church, VA. 22046
(703) 536-3063 Tele.
(703) 536-4841 Fax.

Counsel For Complainant
DHX, Inc.

EXHIBIT A Page 5

Certificate of Service

I hereby certify that I have served a copy of this Amended Complaint, by first class mail, postage prepaid, upon the below listed counsel for defendants.

Dated this 29th day of April 2002.

RICK A. RUDE, Esq.

Mr. Richard A. Allen
888 - 17th Street, N.W.
Suite 600
Washington, D.C. 20006

Mr. C. Jonathan Benner
401 - 9th Street, N.W.
Suite 1000
Washington, D.C. 20004

EXHIBIT A Page 7

FLYNN, DELICH & WISE
ATTORNEYS AT LAW
One World Trade Center, Suite 1800
Long Beach, California 90831-1800
(562) 435-2626

PROOF OF SERVICE BY PERSONAL SERVICE AND OVERNIGHT MAIL

STATE OF CALIFORNIA, COUNTY OF LONG BEACH

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is One World Trade Center, Suite 1800, Long Beach, California, 90831.

On October 7, 2002, I served the foregoing document (on recycled paper) described as **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Michel F. Mills **(PERSONAL SERVICE)**
Ronald Beck
PERONA LANGER BECK LALLANDE
& SERBIN
300 East San Antonio Drive
Long Beach, California 90807-0948
Fax: 562/490-9823

Courtesy Copy To: **(FEDERAL EXPRESS-OVERNIGHT MAIL)**

C. Jonathan Benner
Leonard L. Fleisig
TROUTMAN SANDERS LLP
401 9th Street, N.W. – Ste. 1000
Washington, D.C. 20004-2134
Fax: 202/654-5647

[X] (By Federal Express-Overnight Mail): I deposited such envelope in Federal Express drop box located at One World Trade Center, Long Beach, California, for next day delivery.

[X] (By Personal Service): I caused such envelope to be delivered by hand to the offices of the addressee(s) above.

EXECUTED ON October 7, 2002, at Long Beach, California.

[X] (Federal): I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Jacqueline Araujo

PAGE

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ATTACHMENT NUMBER 6

ERICH P. WISE/State Bar No. 63219
ALEX H. CHERIN/State Bar No. 182087
FLYNN, DELICH & WISE
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Attorneys for Defendant
CSX LINES, LLC

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

DHX, INC.,

Plaintiff,

v.

CSX LINES, LLC and CSX LINES OF HAWAII, LLC and DOES 1 through 100, Inclusive,

Defendants.

CASE NO.: CV 02-6740 RJK (MANx)

[PROPOSED] ORDER

This matter came before the Court for hearing on a Motion to Dismiss the above-entitled action, filed by defendant CSX Lines, LLC (hereinafter, "CSX Lines"), pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The Court, having reviewed the papers presented by plaintiff DHX, Inc. (hereinafter, "DHX") and by CSX Lines, and having heard argument on behalf of both parties and being fully informed, concludes the following:

//

36

FLYNN, DELICH & WISE
ATTORNEYS AT LAW
One World Trade Center, Suite 1800
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(562) 435-2626

Factual Background:

1. DHX, referred to variously as a freight forwarder and a non-vessel operating common carrier ("NVOCC"), offers service to the public transporting shipments between the contiguous United States and points in Hawaii and Guam (commerce known as "non-contiguous domestic trade"). CSX Lines is a vessel-operating common carrier ("VOCC"), operating ships and offering transportation service to the public in the non-contiguous domestic trades. DHX utilizes CSX's vessels and services, and those of another carrier, to move freight in the non-contiguous domestic trades.

2. DHX alleges that CSX Lines charges higher rates to transport shipments tendered by DHX than CSX Lines charges other parties tendering similar volumes of similar goods to CSX Lines for transportation. The purpose of this differential pricing, DHX asserts, is CSX Lines' effort to eliminate DHX as a competitor of CSX Lines in the non-contiguous domestic trades.

3. DHX asserts that CSX Lines' differential pricing violates the duty of a common carrier at common law to charge the same rates to shippers moving similar volumes of similar goods. DHX cites *Western Union Telegraph Company v. Call Publishing Company*, 181 U.S. 92, 21 S. Ct. 561, 45 L. Ed. 765 (1901) ("*Western Union*") as evidence of this duty. DHX labels its claim as a cause of action for common law rate discrimination.

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Conclusions of Law:

1. DHX's complaint fails to state a claim on which relief may be granted. Plaintiff has failed to establish the existence of a common law cause of action for rate discrimination against an ocean carrier. Indeed, California precedent states that such a cause of action does not exist, unless coupled with a showing that the carrier's rates are also unreasonable. *Cowden v. Pacific Coast Steamship Co.*, 94 Cal. 470, 480, 29 P. 873 (1892) ("*Cowden*"). *See also City and County of San Francisco v. Western Air Lines, Inc.*, 22 Cal. Rptr. 216, 204 Cal. App. 2d 105, 134 (Cal. Ct. App. 1962). Plaintiff DHX specifically denies making any claim in this Court that CSX Lines' rates are unreasonable. Moreover, *Western Union* does not address a situation like this, where the complaining customer is simultaneously a competitor of the carrier.[1]

2. The Court finds that this matter lies within the primary jurisdiction of the federal Surface Transportation Board ("STB"), not this Court. Determining whether the rates and practices of an ocean carrier in the non-contiguous domestic trade are reasonable (*i.e.*, lawful) is a matter committed to the expertise of the STB. 49 U.S.C. § 13701(a)(2000); *Sea-Land Service v. Atlantic Pacific International*, 61 F. Supp. 2d 1102, 1113 (D.C. Haw. 1999);

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[1] *See DHX v. Matson Navigation, et al.*, STB Docket No. WCC-105, 2001 STB LEXIS 998 at *5 (served Dec. 21, 2001) ("DHX competes with the defendants for traffic that defendants could themselves solicit.").

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Ocean Logistic Management, Inc. v. NPR, Inc., 38 F.Supp.2d 77, 83-84 (D. P.R. 1999). *See also RTC Transportation, Inc. v. Motor Carrier Audit & Collection Co.*, 971 F.2d 368, 372 (9th Cir. 1992) (the ICC had "exclusive primary jurisdiction" to determine rate reasonableness). Whether allegedly discriminatory rates are improper historically has been closely tied to the reasonableness of the rates. *See MCI Tel. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 230, 114 S. Ct. 2223, 129 L.Ed. 2d 182 (1994).

The statute administered by the STB indicates that discrimination remains relevant to the agency's decision-making, 49 U.S.C. §§ 13101(a)(1)(D) and 13702(b)(4) (2000), despite elimination of a specific discrimination cause of action previously benefiting freight forwarders. The STB has already held in a pending administrative complaint proceeding filed by DHX, which is based on substantially the same operative facts as DHX's complaint here, that the agency will consider DHX's claims that CSX Lines is trying to put DHX out of business through CSX Lines' pricing and other practices. *DHX, Inc. v. Matson Navigation Co., et al.*, STB Docket No. WCC-105, 2001 STB LEXIS 998 (served Dec. 21, 2001). Therefore, the Court finds that DHX's complaint lies within the STB's primary jurisdiction. Should DHX be dissatisfied with the result before the STB, it may seek review of the agency's decision by a federal appellate court under the Hobbs Act, 28 U.S.C. §§ 2321 and 2342(5).

Accordingly, CSX Lines' motion is GRANTED under both Fed. R. Civ. P. 12(b)(6) and 12(b)(1), and DHX's complaint in this matter is DISMISSED WITH PREJUDICE. Each party shall bear its own costs.

Dated: JAN 24 2003

Robert J. Kelleher
United States District Judge

Submitted by:

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For Defendant CSX Lines, LLC

ATTACHMENT NO. 7

The Statutory Structure

Complainant, DHX, Inc., hereby identifies the statutes and regulations that Defendants have violated and which are the subject of this complaint proceeding.

Defendants are carriers subject to regulation pursuant to the provisions of the ICC Termination Act of 1995 (ICCTA), 49 U.S.C. §§13101 et seq. (1996 Supp.). Defendants have violated sections 13701(a), 13702(a) and 13702(b) as well as sections 1312.2(a), 1312.2(b), 1312(3)(a), 1312.3(c), title 49 Code of Federal Regulations. Defendant Sea-Land Service, Inc., now known as CSX Lines, LLC has further violated section 1312.14(a) and section 1312.14(b) in that defendant's tariff contains the representation that it provides for "joint rates" but that the tariff contains no identification of any participating carrier other than defendant nor any "through routes" as required for a joint rate.

In addition to the above, both defendants have published tariffs which attempt to utilize non-transportation factors as a basis of ratemaking and which result in a pattern of numerous duplicating and conflicting rates through out the involved tariffs.

Section 13701(a) requires that a regulated carrier's rates, classifications and practices be 'reasonable'. Section 13702(a) requires carriers to provide service only if the carriers rates and charges for the carrier's services are contained in a filed tariff. Section 13702(b) provides the

minimum statutory requirements for the contents of a tariff. These minimum requirements include the identification of the carriers that are parties to the tariff (§§13702(b)(1)(A)), the privileges given and facilities allowed (§§13702(b)(1)(D)) and any rules that change, affect, or determine any part of the published rate (§§13702(b)(1)(E)).

Defendants have a duopoly in the subject market. They exercise a form of price leadership or conscious price parallelism through the public exchange of price information which results in the matching of rates and charges. These carriers further publish rates and charges on commodities that are not subject to regulation in order to maintain the exchange of such information. These carriers likewise publish the purported inland divisions of motor carrier portions of purported "through joint rates" which are not required to be public pursuant to 49 U.S.C. §§13702(b)(3). These carriers further publish the names and some of the information related to their services for "major" or large shipper accounts which is not required by the ICCTA. These carriers, however, appear to withhold or fail to publish all service terms and conditions which include the apparent existence of cargo volume commitments by these large customer accounts. The carriers decline to make volume pricing available to freight forwarders and the complainant in particular, based upon the representation that neither carrier participates in any form of volume pricing nor service contract arrangements in the subject domestic offshore trade.

In addition to the above, these carriers have entered into a capacity rationalization agreement which has been implemented as a reciprocal "shipper-carrier" arrangement and is being conducted by the carriers in apparent violation of section 13702(b)-(1), 49 U.S.C. (1997 Supp.). The pattern of price parallelism and elimination of service competition represents a breakdown of competition in or a "market failure" in the Noncontiguous Domestic Trade to and from Hawaii.

The Board's Rules of Practice and Procedure permit the submission of claims against carriers individually and jointly. Complainant hereinafter sets forth its claims against each of defendants individually and thereafter those claims that may be made against defendants jointly.

(I)
COMPLAINANT'S CLAIMS AS TO DEFENDANT
MATSON NAVIGATION COMPANY

Count 1

81. Complainant hereby incorporates the averments contained in paragraphs 1 through 80 as if set forth in full.

82. Matson, in its tariffs 14-F and 2016-D, at all times material to this complaint, has published 'minimum revenue' rates in freight classification rules.

83. Matson, Rule 31(a)(2) of Tariff 14-F, and Rule 884(a) of Tariff 2016-D, impose upon shippers a minimum revenue charge on containers classified by the Rules as "Overflow" containers.